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BEFORE THE

Supreme Court of The United States

October Term, 1944

No. 558

AMERICAN TRUCKING ASSOCIATIONS, INC., et al,
Appellants,

v.

UNITED STATES OF AMERICA
AND THE
INTERSTATE COMMERCE COMMISSION,
Appellees.

BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC., et al. APPELLANTS.

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BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC., et al APPELLANTS

OPINION OF THE LOWER COURT

The opinion of the United States District Court for the Eastern District of Virginia appears, beginning at page 206 of the record and is reported in 56 Fed. Supp. 394.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court arises under Sec. 228 of the Judicial Code, 28 U. S. C. A. 345. This Court noted jurisdiction on November 20, 1944.

STATEMENT OF THE CASE

This action arose from a suit to set aside certain orders of the Interstate Commerce Commission. The Commission, in a long series of proceedings, issued certificates of public convenience and necessity authorizing the Seaboard Air Line Railway Company to engage in extensive motor carrier operations. The motor carrier operations which the Seaboard was authorized to conduct involve the same territory served by appellants and will compete with appellants in their motor carrier operations.

Appellants, conceiving themselves to be injured, seek to have set aside the authority which the Commission granted the Seaboard. The grounds for such complaint involve in general: (a) jurisdiction and power, (b) proper forum, (c) reasonable hearings, (d) evidence to support findings, (e) lack of findings, and (f) exemptions from statutory provisions.

The Seaboard Air Line Railway intervened in support of the Commissions orders. The defendant, the United States answered, admitted the facts alleged by plaintiffs and confessed error.

The court below by majority opinion sustained the Commission on all points.

STATUTES INVOLVED

The statute involved is the Interstate Commerce Act, 49 U. S. C. A., and particularly:

National Transportation Policy, 54 Stat. 899, 49 U. S. C. A. 901.

Acquisition of motor carriers by railroads, Sec. 5(b), 49 U. S. C. A. 5(b).
Jurisdiction of Joint Boards, Sec. 205, 49 U. S. C. A. 305.
Certificates of Convenience and Necessity, Sec. 206, 207, 49 U. S. C. A. 306, 307.
Procedure, Sec. 17, 49 U. S. C. A. 17.
Publication of Tariffs, Sec. 216, 217, 49 U. S. C. A. 316, 317.
Accounting, Sec. 220, 49 U. S. C. A. 320.

In brief, these statutory provisions are involved in this case in the following respects:

(a) The Transportation Policy, recognized the motor carrier industry as a separate and independent mode of transportation and provided for fair and impartial regulation of all transportation agencies. Appellants contend that the Commission has, contrary to the Congressional intent and directives, sought to integrate railroad and motor transportation to the purpose and end of promoting integrated transportation systems under single ownership, and whereby motor transportation is to become merely a subordinate facility to be used by railroads for their convenience. Appellants further contend that pursuant to the policy adopted and applied by the Commission, its administration of the law has become moulded in a pattern which is preferential to railroads and discriminatory against motor carriers.

(b) The statutory provisions governing the acquisition of motor carriers by railroads (Sec. 5(b)) provides for certain factual findings. Appellants contend that the Commission has substituted its general policy in lieu of the specific factual findings required by law.

(c) The sections having to do with the issuance of certificates of convenience and necessity (Sec. 206, 207) relate

to public convenience and necessity. Appellants contend that the Commission has substituted its general policy for the usual and normal criteria of public convenience and necessity and as a result, it issues motor carrier certificates to railroads on a bare showing of railroad convenience.

(d) Motor carriers operating under certificates of convenience and necessity are required to file motor carrier tariffs (Sec. 216, 217). Appellants contend that the Commission has exempted motor carriers which are directly owned by railroads, from filing motor carrier tariffs and thereby exceeds its authority and unlawfully discriminated against independent motor carriers, including appellants.

(e) Motor carriers operating under certificates of convenience and necessity are required to file various motor carrier accounting reports (Sec. 220). Appellants contend that the Commission has exempted motor carriers which are directly owned by railroads from keeping motor carrier accounts and thereby exceeded its authority and unlawfully discriminated against independent motor carriers, including appellants.

(f) The hearings contemplated by the Act (Sec. 17) are fair and reasonable hearings. Appellants contend that the Commission has adopted the policy of granting certificates of convenience to railroads, and that in substance and effect, it now limits the evidence to that which establishes railroad convenience, and excludes evidence bearing on public convenience, the effect on competing carriers, and restraint of competition.

(g) Certain statutory requirements were made with respect to matters which must be referred to Joint Boards for hearing and further provisions were made with respect to the composition of Joint Boards (Sec. 205 (b)). Appellants contend that the Commission disregarded these statutory requirements and failed and refused to either

hear the applications or to refer them to a properly constituted Joint Board.

SUMMARY OF COMPLAINT

The suit was commenced by complaint filed October 21, 1943 (R. 1).

Paragraph V (R. 7) charges error by reason of the failure of the Commission to either conduct the hearing itself on the several applications of the Seaboard or to refer said applications to a properly constituted Joint Board.

Paragraphs VI to IX (R. 10-15) charge error by reason of the failure and refusal of the several Joint Boards to conduct proper hearings; the failure and refusal of the Commission to consolidate the applications in order that a proper hearing might be conducted; and the issuance of a certificate by Division 5 of the Commission and by the full Commission, without having conducted a proper hearing and without having received evidence upon which findings required by statute might have been based.

Paragraph X (R. 15) charges error in that upon petition of the Seaboard the full Commission reversed Division 5 by abolishing certain conditions which Division 5 had imposed, and substituted new and different conditions without a hearing and without any evidence upon which the findings required by statute might have been made.

This paragraph also charges error in that upon reopening the proceedings for further modification of the conditions which the full Commission had imposed, the Commission, for the first time, consolidated the applications for hearing (by the Commission as distinguished from Joint Boards), but so restricted the scope of the hearing that protestants, appellants here, were further denied an opportunity to present the evidence which they

had sought to have the record show from the beginning of the proceedings.

Paragraph XI (R. 16) charges error in that upon the consolidation of the several applications which had been filed by the Seaboard and upon hearing of said applications on a consolidated record, the Commission refused to allow the introduction of evidence bearing on proof of public convenience and necessity and further refused to receive evidence bearing on monopoly and restraint of competition.

Paragraph XII (R. 20) charges error in that the Commission exempted the motor carrier operations, which the Seaboard was authorized to conduct, from the tariff provisions of Sec. 217.

Paragraph XIII (R. 20) charges error in that the Commission exempted the Seaboard from requirements for the keeping of motor carrier accounts and records in accordance with the provisions of Section 220 and the Commissions rules and regulations thereunder.

Paragraph XIV (R. 21) charges error in that the Commission failed and refused to apply the same regulations in connection with motor carrier operations conducted by railroads, which it requires of independent motor carriers, and particularly appellants here, and thereby failed and refused to administer the act fairly and impartially.

Plaintiffs further charge that by reason of the unreasonable and discriminatory administration of the law that plaintiffs would suffer irreparable injury and damage.

Prayers (R. 22). Plaintiffs requested that the orders of the Commission be set aside and that the matters involved be remanded to the Commission with directions to conduct a fair and reasonable hearing and to receive evidence upon which statutory findings might be made.

RULINGS BELOW

Upon hearing on the issues the majority of the court below, Dobie, Circuit Judge and Barksdale, District Judge, (R. 206 et seq) held:

1. Constitution of Joint Boards - Consolidation of the Individual Applications (R. 207).

The court disposed of this point by finding that the assignment of matters for hearing by Joint Boards and the constitution of the Joint Boards were matters within the discretion of the Commission.

2. Exclusion of Evidence - Fair Hearing (R. 209).

The court found that much of the proffered evidence might have been relevant had the Commission consolidated the applications but concluded that "it is open to very serious question whether this excluded evidence would have, if admitted, influenced the decisions of the Commission".

3. Use of Improper Criteria as to Public Convenience and Necessity (R. 210).

The court concluded that inasmuch as the motor carrier operations which the Seaboard proposed to conduct, were to be coordinated with its railroad operations and were therefore a different type of transportation, the Commission was warranted in departing from the normal criteria of public convenience and necessity.

4. Monopoly (R. 211).

The court adopted the statements of the Commission: "Nor does it appear from the records made in these cases that there will be any great diversion of traffic from independent motor carriers." (17 M.C.C. 432). "Nor will they adversely affect the operations of existing motor carriers, nor restrain competition in the motor carrier field." (34 M.C.C. 444)

In support of its conclusion the court quoted from another opinion of the Commission: "One competitive carrier has no vested right in the continuation by another of an inefficient method of operation, and we believe it to be neither the policy of Congress nor the proper function of this Commission to retard any form of progress in transportation which will serve the public interest". (28 M.C.C. 10).

The only factual matters referred to by the court as being in support of the conclusions stated by the Commission, appear to be the Court's reference to the fact that, during the pendency of this litigation, the Seaboard has refrained from inaugurating all of the operations authorized and has discontinued some of them.

5. Laches (R. 212)

The Seaboard, intervenor below, raised the issue of laches, however the court did not pass on this question.

6. Fraud (R. 213)

Plaintiffs below contended that the filing by the Seaboard of numerous separate applications (many of them filed on the same date) and the holding of separate hearings on each of these separate applications, had the effect of depriving protestants of their opportunity to show the manner in which they would be adversely affected by the combined operations. This, plaintiffs contended, resulted in the perpetuation of a legal fraud on the procedure contemplated by the act. The court below found no substance in plaintiffs' contention.

7. The position of the United States in this Case (R. 213).

The United States intervened in this case when the Commission consolidated these applications for hearing and consideration of the Seaboard's petition for removal

or modification of conditions. When the complaint was filed it named the United States as a necessary statutory defendant. The United States answered and confessed error. The Interstate Commerce Commission defended its orders. With respect to the position taken by the Anti-trust Division, which was in substance, the position taken by the plaintiffs, the court said:

> "The contentions advanced by these counsel we find to be lacking in substantial merit".

8. Separate Tariffs and Accounting for Motor Traffic (R. 214).

Plaintiffs contended that the Commission was without power to exempt the Seaboard from the tariff and accounting provisions of the Motor Carrier Act. The court found that these were matters entrusted to the sound discretion of the Commission.

9. Reflections on the Interstate Commerce Commission (R. 214).

The court (copied from a brief filed by the intervenor, Seaboard) quoted some of the charges which counsel for plaintiffs made through a brief of approximately 200 pages. Being fully aware that, following six years of frustration, the brief would deal boldly with the issues, counsel were careful to preface the brief by what was believed and intended to be a full and adequate disclaimer of any reflections on the integrity of the Commission, but the court overlooked the disclaimer and apparently concluded, most erroneously, that counsel had been critical of the Commission in some manner distinguishable from critical in the legal sense.[1]

10. Presumptive Validity of the Commission's Orders (R. 215).

[1]The facts with respect to this matter are shown at [redacted] page 151 [redacted] hereto.

The court took the position that all of the points raised by plaintiffs were matters within the administrative discretion of the Commission and therefore did not present justiciable issues.

Dissenting Opinion by Paul, District Judge (R. 216)

Judge Paul concluded that plaintiffs had been denied a full and fair hearing and to that extent the action of the Commission was unreasonable and arbitrary. He also concluded that the Commission had failed to apply the proper statutory standards in its determination of "public necessity and convenience".

LEGISLATIVE HISTORY OF STATUTE

The portions of the Interstate Commerce Act upon which the issues in this case turn, were originally enacted as the Motor Carrier Act of 1935. In 1940 the Interstate Commerce Act was amended and the Motor Carrier Act became Part II of the Interstate Commerce Act. The Congressional declaration of "transportation policy" was first enacted as an introductory to the Motor Carrier Act. In 1940 it was re-enacted as a declaration of "transportation policy" with reference to the entire Interstate Commerce Act. The Motor Carrier Act of 1935, contained in Sec. 213, a committee amendment requiring certain findings by the Commission in connection with acquisition of control of motor carriers by railroads, and in 1940, old Sec. 213, was re-enacted as Sec. 5(b) of Part I. The changes above outlined involve transposition of provisions of the Act, rather than changes in substance.

In 1940 Congress substantially re-wrote Sec. 202 of the Motor Carrier Act, and by Sec. 202(a)(1) Congress delimited the motor carrier operations which might be conducted by railroads, water carriers, and freight forwarders, without such operations being subject to the provisions of the Motor Carrier Act. The operations so

exempted, were restricted to collection and delivery service within terminal areas.

The Motor Carrier Act of 1935, came after about 10 years of Congressional consideration of federal regulation of motor carriers. During that period approximately 20 bills were introduced and as to some of them extensive hearings were held.

During the same period the Interstate Commerce Commission conducted two general investigations involving transportation by motor vehicle. Some of the reports of the Commission were printed as Congressional documents and were also printed in the reports of the Interstate Commerce Commission. The most important report issued by the Commission was *Coordination of Motor Transportation*, 182 I.C.C. 263, decided April 6, 1932. The Commission had also issued a prior report titled *Motor Bus and Motor Truck Operation*, 140 I.C.C. 685, decided April 10, 1928. The Commission transmitted to Congress two reports which were printed as Congressional Documents, as follows:

Document 152, Senate, 73rd Congress, Second Session. Document 89, House, 74th Congress, First Session. Senate Bill 1629 became the Motor Carrier Act and hearings on this bill were held February 25 to March 6, and March 15 to 19th, 1935.

JUDICIAL HISTORY OF STATUTE

1. Criteria - Public Convenience and Necessity

With respect to the proper criteria for determining convenience and necessity under Secs. 206 and 207, where railroads are applicants, this case (No. 558) and the case of *United States* v. *Parker* (Nos. 507 and 508) this term, are the only cases directly bearing on the subject. These cases have been assigned for argument on the same date.

In these two cases the courts below reached different conclusions.

Under different facts and circumstances, some elements of the question have been before this Court in the following cases:

Texas and P. R. Co. v. *Gulf and S. F. R. Co.*, 270 U. S. 266, 70 L. ed. 578.

Texas and N. O. R. Co. v. *Belt R. Co.*, 276 U. S. 475, 72 L. ed. 661.

Texas v. *U. S.*, 292 U. S. 522, 78 L. ed. 1402.

C. & O. Ry. Co., v. *U. S.* 283 U. S. 35, 75 L. ed. 824.

2. Policy Of The Commission

Since the enactment of motor carrier legislation, the question of transportation policy as promulgated by the Commission has been before this Court in the following cases:

Eastern Central M. C. Assn. v. *U. S.*, ... U. S. ....., 88 L. ed. 431.

Carolina Frt. Car. Corp. v. *U. S.*, 315 U. S. 475, 86 L. ed. 971.

Pennsylvania R. R. v. *U. S.*, decided January 29, 1945.

3. Fair and Reasonable Hearings

We are not familiar with any cases under the Motor Carrier Act in which this Court has had occassion to consider the question, however, this Act adopts the procedure theretofore applicable to Part I, and this Court has in connection therewith considered the matter in a number of cases.

Interstate Commerce Commission v. *L. & N. R. Co.*, 227 U. S. 88, 57 L. ed. 431.

Baltimore & Ohio R. Co. v. *U. S.*, 264 U. S. 258, 68 L. ed. 667.

4. Discriminations Against Motor Carriers

Here the Commission has employed discriminatory administrative practices which prejudice motor carriers and favor railroads. To the extent that such procedure involves a policy, this Court has considered the Commission's policy in the following case:

Eastern-Central M. C. Assn. v. *U. S.*, ... U. S. ....., 88 L. ed. 431.

5. Findings of Fact

In connection with both Parts I and II of the Interstate Commerce Act, this Court has had occasion to reverse the Commission on its failure to heed the requirements that it make appropriate findings for the purpose of meeting statutory requirements and for the purpose of facilitating judicial review.

Yonkers v. *U. S.*, ... U. S. ....., 88 L. ed. 241.
Florida v. *U. S.*, 282 U. S. 194, 85 L. ed. 291.
U. S. v. *B. & O. R. Co.*, 293 U. S. 454, 79 L. ed. 587.
U. S. v. *Chicago M. St. P. R. Co.*, 294 U. S. 499, 79 L. ed. 1023.
Eastern-Central M.C. Assn. v. *U. S.*, ... U. S. ....., 88 L. ed. 431.

6. Hearings By Joint Boards

The question as to whether an application should be heard by the Commission or by a Joint Board has been before the Federal Courts in the following cases:

North Coast T. R. Co v. *U. S.*, 54 Fed. Supp. 448.
Empire Trails, Inc. v. *U. S.*, 53 Fed. Supp. 373.
Carolina Scenic Coach Co. v. *U. S.*, 56 Fed. Supp. 801, Affirmed No. 637, Oct. Term 1944.

The Commission has, on occasions, taken a view of the matter which differs from the procedure followed here.

Herman Clary C. C. Application, 32 M. C. C. 5.

7. Injunction Proceedings Against Railroads

The Department of Justice upon being advised that the Association of American Railroads (including the Seaboard) had entered into a conspiracy to defeat the coordination of transportation between railroads and independent motor carriers, brought suit under the Anti-trust Laws. The suit was brought in the District of Columbia on October 25, 1939 and was titled *U. S.* v. *Association of American Railroads,* Civil Action No. 4551. On July 18, 1941, a final decree was entered permanently enjoining the railroads.

Further reference to the issues of monopoly and the Anti-trust Laws are found in:

McLean T. Co. v. *U. S.,* 321 U. S. 67, 88 L. ed. 358.

8. Interests of Competing Carriers

In cases challenging the issuance of operating authority this Court has recognized the interests of competing modes of transportation in such matters.

Alton Railroad Co. v. *U. S.,* 315 U. S. 15, 86 L. ed. 586.

SUMMARY OF EVIDENCE

Appellants' Evidence

The gravamen of this action concerns the alleged refusal of the Commission to receive and consider evidence and to otherwise conduct a fair and reasonable hearing. For those reasons the summary of appellants' evidence is necessarily a summary of appellants' efforts to introduce evidence, rather than a summary of their success.

The Court below found:

"Protesting motor carriers next complain of the refusal of the Joint Board to receive and consider certain evidence offered by protestants. As a result, we are told: 'Every effort of plaintiffs to have the proceeding conducted under any semblance of a fair, reasonable and statutory hearing was summarily rejected by the Commission.'

"This complaint of plaintiffs is cognate to the Commission's refusal to consolidate the several applications of Seaboard. This proferred evidence covered a wide field and much of it might have been relevant had the Commission consolidated the applications. This evidence seems to have been excluded by the Joint Boards on the ground that each Joint Board was necessarily limited to deciding upon, and only upon the particular application, or applications, before that Board.

"Some evidence on the points which the protestants sought to develop did filter into the hearings before the Joint Boards. The Commission had before it the reports of all the Joint Boards. When, therefore, the Commission decided against consolidation, against a reopening of the case and against a rehearing of the matters, with the applications considered together as a whole, we think this contention of plaintiffs falls to the ground. Then, too, it is open to very serious question whether this excluded evidence would have, if admitted, influenced the decisions of the Commission." (R. 209, 210)

Typical illustrations of the efforts of the appellants to introduce evidence and to cross-examine witnesses were attached to and made a part of the complaint and were identified as Exhibit B-3 thereof and is set forth in the record (R. 37-44).

The steps taken by the appellants to secure a consolidated hearing on the several applications in order that evidence might be introduced are shown by complaint Exhibits C, D, and E, which are set forth in the record (R. 44-51).

The order of the Commission denying appellants' motions and petitions was attached to the complaint as Exhibit F (R. 52).

Subsequently the Commission reopened and consolidated all of the dockets for the purpose of modifying or removing certain conditions which had been attached to the certificate. The order of the Commission reopening the proceeding was attached to the complaint as Exhibit N (R. 135, 136). It will be observed that said order in and of itself restricted the scope of the proceedings and the evidence which would be received, and pursuant to such restrictions the examiner excluded the evidence which appellants sought to introduce.

Upon the consolidation and reopening of the proceedings the Anti-trust Division of the United States Department of Justice intervened, and upon the refusal of the examiner to admit evidence the said department petitioned the Commission for further hearing and the receipt of essential evidence and said petition was attached to the complaint as Exhibit P (R. 137, 141).

Appellants also petitioned the Commission for reopening, rehearing and the admission and production of evidence and said petition was attached to the complaint as Exhibit Q (R. 142-151).

The Commission denied the motions of the Anti-trust Division and of appellants and the order of denial was attached to the complaint as Exhibit R (R. 151).

Because of the piece-meal hearing by Joint Boards of the several applications in the first place and the refusal of the Commission to receive evidence when the applications were consolidated, appellants were continuously deprived of an opportunity to present any evidence dealing with the overall picture presented by the numerous applications for operating authority. Under such circumstances a summary of appellants' evidence is but a summary of their efforts to introduce evidence and of the denial orders

issued by the Interstate Commerce Commission. This is the picture which was recognized by Judge Paul in his dissent below.

As stated by the majority opinion below, some evidence "did filter into the hearings," but this evidence related solely to the individual segments of the operations which the railroad sought to conduct. The futility of introducing evidence with respect to segments of the operations was so apparent that appellants discontinued those efforts with respect to a number of the applications before Joint Boards, and this was done in contemplation of the Commission consolidating the proceedings and granting a proper hearing.

Witnesses For Appellants

In the course of the separate hearings on the separate segments of the operating rights applied for, 34 witnesses appeared in opposition, of whom 5 were so-called public witnesses and 29 represented motor carriers.

The substance of the testimony given by the public witnesses was that there was no need for more transportation facilities. They also expressed some concern over the possibility that the entrance of the railroad into the motor carrier field might result in eventual abandonment of branch lines operated by the railroad.

Witnesses for the motor carriers testified in general with respect to their routes; the service rendered; the number of competitors operating over the route; their ability and willingness to coordinate their services with those of the railroad; and their surplus transportation capacity.

Appellees' Evidence

Generally appellees' evidence related to various improvements which might be made in the service of the railroad

by the use of line-haul trucks. These contemplated improvements related principally to expedited delivery.

Considerable testimony was introduced bearing on economies which might be effected by eliminating train stops, over-time wages, etc. However, this evidence as a whole, was somewhat contradictory in that it was also repeatedly denied that the discontinuance of any trains or train services, was contemplated.

Witnesses For Appellees

In the course of the separate hearings of the separate segments of the operating rights applied for, 41 witnesses appeared in support of the applications, of whom 22 were so-called public witnesses and 19 were employees of the railroad applicant. The public witnesses testified generally that there was always room for improvement in transportation service and if, as the applicant contended, the proposal would result in better service, then they favored it.

The railroad employees testified generally as to train operations, train schedules, delivery schedules and economies.

The railroad witnesses disclaimed any knowledge of the service being given by independent truck lines and stated that the applicant would not cooperate or coordinate with independent motor carriers under any circumstances.

They testified that rights applied for would be convenient for the railroad.

ASSIGNMENT OF ERRORS
(R. 225)

Come now the American Trucking Associations, Inc., and, in connection with their petition for appeal, submit the following Assignment of Errors committed by the majority of the learned District Court of the United

States for the Eastern District of Virginia, in the course of the proceedings and in and by the decision filed July 17, 1944, and the terms of final decree passed and entered on the 21st day of July, 1944, in the above-entitled cause:

1. The said District Court erred in that it decreed the petition of petitioners, American Trucking Associations, Inc., et al, to be denied and dismissed and that the Interstate Commerce Commission have judgment against the plaintiff, notwithstanding that as specifically averred in said complaint, and firmly established by the proof, the orders of the Interstate Commerce Commission, as set forth in Paragraph 4 of the complaint and the exhibits therein referred to, then and now complained of were and are illegal and should be held to be void, because: The said Commission misconceived its statutory duty in that:

(a) The reports and orders of the Commission conclusively show that contrary to law, the Commission issued motor carrier certificates to the Seaboard Railway on the assumption that it had statutory authority and jurisdiction to recognize and certificate a hybrid type of carrier consisting of a combination of rail and motor service.

(b) The reports and orders of the Commission show that it regarded the applications for certificates of convenience and necessity to conduct hybrid operations (part rail and part motor) as being matters not controlled by the usual legal criteria for public convenience and necessity under Sections 206(b) and 207 of Part II, and the Commission further concluded, contrary to law, that such operations could be exempted from other provisions of Part II, i. e., Section 216, covering tariffs, and Section 220, covering accounting, and accordingly so exempted such operations.

(c) The reports and orders of the Commission show that, contrary to law, the Commission failed and refused to provide nondiscriminatory provisions in certificates (Sec. 208) and to give force and effect to the provisions of the

National Transportation Policy, with particular reference to the requirements for fair and impartial regulation of, and the preservation of the inherent advantages of, each type of transportation committed to its jurisdiction.

2. The said District Court erred in holding that the Commission had received evidence and applied proper legal criteria in determining public convenience and necessity under Section 206(b), in that:

(a) The reports and orders of the Commission conclusively show, and the Commission on brief admitted, that it did not apply in these railroad cases the normal criteria which it had applied in other motor carrier cases where independent motor carriers were applicants, but applied a different "policy" of its own determination where railroads and railroad owned motor carriers are applicants for motor carrier rights.

(b) The reports and orders of the Commission show that normal criteria for the determination of public convenience and necessity was either disregarded, or subordinated to the point of exclusion, and that the Commission substituted in lieu thereof, a policy based on determination of railroad convenience.

(c) The reports and orders of the Commission show that the Commission deemed it immaterial and therefore disregarded the willingness and ability of the independent motor carriers to furnish adequate service in the territories covered by railroad applications and to coordinate their services with those of railroads, whereas, the Court found that the Commission did consider the service rendered by independent motor carriers in connection with its determination of public convenience and necessity.

(d) The Commission denied appellants a fair and reasonable hearing in that it failed and refused to receive and consider evidence pertinent to the issue of public con-

venience and necessity and denied itself a record from which the required statutory findings might be made.

(e) The said District Court misconceived the distinction between railroad applications under the "grandfather" clause of Sections 206(a) and the proof there required, being proof of past services only, as opposed to applications under Sections 206(b) and 207 of Part II, requiring proof of present and future public convenience and necessity.

3. The said District Court erred in concluding that the Commission had given proper consideration to and made the requisite statutory findings in connection with restraint of competition under Section 5 of Part I, in that:

(a) The Court misconceived the issue presented and assumed that plaintiffs were directly seeking to have the Commission administer the Anti-Trust Laws, whereas, the complaint (Paragraph 5(b)) specifically put in issue the statutory findings required by old Section 213(a)(1) of the Motor Carrier Act (Part II of the Interstate Commerce Act) and New Section 5(a)(b) of Part I of the Interstate Commerce Act, and in connection therewith:—

(b) In denying plaintiffs' contentions that the Commission had refused to receive evidence and failed to make the required statutory findings, the Court quoted several conclusions, from the reports of the Commission, in support of the view taken by the Court, and seemingly overlooked the fact that the cited conclusions of the Commission are among the conclusions which plaintiffs charged were unsupported by the evidence.

(c) The Court found, "there is ample evidence to support these findings," however, plaintiffs contended that there was no evidence to support the conclusions of the Commission and the Court did not refer to any evidence in support of the conclusions of either the Commission or the Court, nor was there any evidence from which the

Court or the Commission might have reached their respective conclusions.

4. The said District Court erred with respect to the provisions of Section 205(a) of Part II, as follows:

(a) In holding that the Commission had power and jurisdiction to assign the several applications, filed by the receivers of the Seaboard Air Line Railway Company, for separate hearings before several separate Joint Boards.

(b) In holding that the assignment of such separate applications for separate hearing before separate Joint Boards was a well established administrative practice.

(c) In holding that plaintiffs' timely and repeated objections and exceptions to the separate Joint Board proceedings were addressed to the sound discretion of the Commission as opposed to plaintiffs' contentions that said exceptions were grounded on mandatory statutory requirements.

5. The said District Court erred in holding that the Commission had accorded plaintiffs full, fair and reasonable hearings under Secs. 205(a)(e), 206, and 207 of Part II and Sec. 217 of Part I, and that plaintiffs were not injured by the exclusion of evidence, in that:

(a) The said District Court was inconsistent and in error in finding that "much of it (excluded evidence) might have been relevant had the Commission consolidated the applications," and then concluding that plaintiffs had been accorded full, fair and reasonable hearings, despite the fact that the Court also found that the Commission failed and refused to either consolidate the hearings or receive the evidence.

(b) The said District Court was inconsistent and in error in finding, on the one hand, that "each Joint Board was necessarily limited to deciding upon, and only upon, the particular application, or applications, before that Board,"

and then, on the other hand, concluding that the Commission, by giving consideration to an aggregate of records of hearings, which were individually deficient, thereby cured the errors which were inherent in the individual records.

(c) The said District Court was inconsistent and in error in finding, "Then, too, it is open to very serious question whether this excluded evidence would have, if admitted, influenced the decisions of the Commission," and then proceeding, as the Court did, to resolve this "serious question" in favor of the Commission and against these plaintiffs.

6. The said District Court erred in assuming that the doctrine with respect to the "presumptive validity which attaches to the determination of an administrative tribunal," is applicable in this case, in that:

(a) The decisions dealing with the issue are not dogmatic in the sense that they may be lifted from their factual setting and transplanted.

(b) The issues involving error on the part of the Commission which were presented to the Court, involved errors of law, in connection with statutory construction, as distinguished from matters of discretion which are committed to administrative determination or expert judgment.

(c) The challenged course of procedure and policy, as now applied by the Commission was placed in issue before the Court, promptly upon the conclusion and exhaustion of administrative remedies.

(d) The Court found, with respect to the Commission's policy in connection with railroad applicants, "this appears to have been a well settled policy of the Commission," whereas the "policy" was one of the precise issues presented to the Court for review and therefore may not be, in and of itself, cited as justification or authority.

7. The said District Court erred in suggesting that plaintiffs questioned the administrative integrity of the Commission, in that:

(a) The abbreviated quotations cited in the opinion of the Court were lifted from their context in the brief and in the form presented, and in a setting of omissions, are misleading.

(b) The brief referred to contained and prominently presented clear and unequivocal expressions of plaintiffs "*respect,*" and "*esteem*" for the Commission and that any terms used in the brief, were "*confined to their legal concept.*" (See appendix)

(c) Those assurances were, in substance, repeated on oral argument and laid a premise widely at variance from inferences which might be drawn from the quotations contained in the opinion.

(d) The conclusions were based on substantial matters of record and were therefore fair legal comment.

SUMMARY OF ARGUMENT

Point 1—Policy of the Commission.

The Commission is in error in conceiving that it has jurisdiction to adopt the *policy* of encouraging and authorizing railroads to engage in the motor carrier business irrespective of the adequacy of existing motor carrier transportation and thereby promote a regulated transportation monoply.

Point 2—Waiver of Proof of Public Convenience and Necessity.

The Commission is without jurisdiction and power to adopt a *policy* which involves waiving the normal criteria of proof of public convenience and necessity, in connection

with issuance of motor carrier certificates to railroads, and the substitution therefor of a mere showing of railroad convenience.

Point 3—Hybrid Operations.

The Commission is without jurisdiction and power to certificate hybrid operations, part railroad and part motor carrier and to exempt such operations from the tariff and accounting provisions of the Motor Carrier Act.

Point 4—Exclusion of Evidence.

By the exclusion of evidence the Commission failed to conduct a fair and reasonable hearing.

Point 5—Failure to Make Findings.

The Commission failed to make the findings required by statute and substituted conclusions for findings.

Point 6—Hearings - Forum.

The Commission failed and refused to either hear the applications itself or to refer them for hearing to a properly constituted Joint Board.

A more complete summary of the argument is set forth under the "conclusion" of this brief.

ARGUMENT

Introductory

This is a test case for the purpose of determining the jurisdiction and powers of the Commission in establishing and carrying out a policy which appellants contend is without statutory basis and is contrary to the intent of Congress.

The importance of the case in its broad aspects concerns the economic future of the entire motor carrier industry

and the entire transportation policy which Congress has laid down.

The breadth and depth of the issues involved may be illustrated by a few mathematical references. There are approximately 250,000 miles of first main line railroads in the United States. Pursuant to the policy adopted by the Commission it has or is about to authorize railroads to own and conduct motor carrier operations paralleling approximately 100,000 miles of railroad; and in addition, it has or is about to authorize the Railway Express Agency, which is a wholly owned railroad subsidiary, to own and conduct motor carrier operations paralleling approximately 100,000 miles of railroad. There is every indication that it is the plan of the Commission to encourage railroads to parallel substantially every mile of railroad in the United States, with two railroad owned or controlled motor carrier operations.

That is the picture which confronts the independent motor carrier industry and which calls for an examination of the *policy* under which the Commission operates.

Point 1—Policy Of The Commission. The Commission Is In Error In Conceiving That It Has Jurisdiction To Adopt The Policy Of Encouraging And Authorizing Railroads To Engage In The Motor Carrier Business Irrespective Of The Adequacy Of Existing Motor Carrier Transportation.

We take the position that "policy" is a legislative function as distinguished from administrative. The Commission would be without jurisdiction to adopt and administer a national transportation policy even if Congress had not acted. If, as we contend, Congress has unmistakably adopted a transportation policy, then it is certain that the Commission may neither adopt a different policy nor circumvent the Congressional policy.

There is involved here, an issue which has been debated by able students of transportation matters for some decades, namely, competition versus regulated monopoly. We contend that the Commission has adopted the "policy" of promoting a regulated transportation monopoly under the auspices of railroads. Appellants well know that this is not the forum to debate the merits of such an issue. But they are also confident that the Commission has not been clothed with jurisdiction to adopt and implement such a policy. Congress has directed the Commission to report its views to it, and Congress has not been content to be advised by the Commission alone, but set up in 1940, an independent agency, the Board of Investigation and Research, to report on the subject.

History of Commission's Policy

The policy which is favored by the Commission, and which we contend the Commission has undertaken to put into effect without Congressional approval, is not new with the Commission. Before the Motor Carrier Act, 1935 was passed, the Commission made its views known on more than one occasion. Its first comprehensive report on the subject was entitled Motor Bus and Motor Truck Operation, published April 10, 1928, and reported in 140 I.C.C. 685. There the Commission said:

> "Steam railroads are, and so far as now can be discerned will remain, the backbone of the national transportation system. They alone can be relied upon for mass transportation and long-distance hauls of passengers and goods." 140 I.C.C. 719.
>
> "Efficient and economical management of railroads will to a constantly increasing extent call for the utilization of motor vehicles for short hauls or as feeder or distributing agencies." 140 I.C.C. 721.
>
> "An official of the railroad expressed the opinion that both forms of transportation could not operate successfully and that one or the other must give way.

He was also of the opinion that there was no possibility of eliminating motor-truck or motor-bus transportation for short hauls, as he felt the public demanded the service." 140 I.C.C. 725.

Then under conclusions, the Commission said:

"3. Railroads, whether steam or electric, and water carriers, subject to the interstate commerce act, should be authorized to engage in interstate commerce by motor vehicles on the public highways, and thereafter such service should be subject to the provisions of the interstate commerce act, * * *." 140 I.C.C. 745.

The Commission issued a second report entitled Coordination of Motor Transportation, published April 6, 1932 and reported in 182 I.C.C. 263. There the Commission said:

"Upon consideration we conclude:

"1. That transportation by motor vehicles, busses, and trucks, over the public highways is, within certain distances, and in certain respects a superior service, and that the rail and water lines should be encouraged in the use of this instrumentality of commerce whereever such use will promote more efficient operation or improve the public service;

"2. That there is substantial competition between rail and water carriers on the one hand and motor carriers on the other for the transportation of both passengers and freight and that this competition is increasing;

"3. That such competition is conducted under conditions of inequality, particularly in regard to regulation;

"4. That a contributing cause, aside from the general business conditions, of the present unsatisfactory financial condition of the railroads is the existence of unrestrained competition by rival transportation agencies;

"5. That there is today, and probably would be under normal conditions, an excess of carrying capacity of existing transportation facilities;

"6. That unrestrained competition is an impossible solution of the present transportation problem and is incompatible with the aim of coordination under regulation;

"7. That Federal legislation relating to the regulation of motor vehicles operating upon the public highways and engaged in interstate commerce is desirable in the public interest." 182 I.C.C. 379-380.

Following these investigations and reports, the Commission transmitted to Congress certain reports by the Coordinator, which were printed as Congressional documents, and which included drafts of proposed legislation.

Senate Document 152, 73d Congress, 2d Session:

"Coordination, as defined in the *Coordination Case* (p. 328), is the 'combining (of) two or more forms of transportation in the interest of better service or economy.' Such combination, it was noted, 'may be effected by a single transportation agency or by the cooperative efforts of different agencies.'" (page 18).

"More formal arrangements for coordination are illustrated by the use which many railroads make of trucks, mainly through subsidiary companies or contractors, in substitution for local, way-freight service or to provide service to points previously served by branch lines, now abandoned. Trucks are also used to supplement train service, giving the shipper more expeditious or better-timed service. They are further employed by railroads in operations which are essentially independent of rail service, although through the use of common officers and facilities a certain degree of coordination is achieved.

"The several uses of trucks in coordination with the railroads, outlined above, *are of clear public advantage.* They suggest possibilities of much greater development in this direction, and these possibilities undoubtedly exist." (page 19.)

"Beyond question they can use trucks and busses to great advantage to supplement or substitute for their rail service, both at terminals and on the line. Already they are doing this to a very considerable extent, as is shown in appendix E, and *the movement is plainly one which should be encouraged,* for it means both greater efficiency and greater economy in service. Some believe that they should definitely become transportation systems, rather than railroad systems, and assume control over all means of transportation. * * *

"While railroads should be permitted to use trucks freely in connection with their rail service, there appears to be no present need for encouraging a movement toward the absorption by them of truck, bus, and water operations. * * *

"Included in railroad self-help is, of course, the proper utilization as an adjunct of rail service of all other means of transportation." (page 34, 35.)

"**Railroad reasons for repeal.**—The reasons offered by the railroads for repeal of the statutory provisions in question are stated in very general terms. They are summed up in the following quotation from the brief filed in support of their proposals:

* * * if there is to be any real coordination of transportation as between rail and water carriers, the rail carriers must be permitted to own, operate, and have an interest in water lines, all the operations of these lines, however, being subject to the jurisdiction of the Interstate Commerce Commission. * * * If there is to be real coordination of a character which will be most helpful to the commerce of the country, we must no longer think of rail transportation, water transportation, and motor transportation as separate and distinct agencies." (page 74.)

"The railroads recommend repeal of the Denison Act,* * *.

"The Denison Act has to do with the establishment of through routes and joint rates between water carriers operating on certain of the inland waterways and connecting rail carriers, and the division of such

joint rates. It was intended to provide a more expeditious handling of such matters than under the Interstate Commerce Act. However, the interpretation placed upon the Denison Act by the Supreme Court in a decision handed down on March 5, 1934, apparently largely nullifies this intent. Careful study of this decision, when published, is desirable, but it seems probable that the act, as thus interpreted, serves no useful purpose." (page 91.)

"It is too much to expect that all of the present facilities of transportation in each group can survive, for there are many which are now without economic justification, but out of the present confusion and waste a sound and well coordinated national system of transportation can be built.

"The agency to achieve this result is believed to be the Interstate Commerce Commission. If transportation is to be coordinated, regulation must be coordinated, and the Commission is the natural and appropriate agency for that purpose. It has been in existence for nearly half a century, and few governmental bodies have stood the test of time as well. No other agency has the organization or the necessary experience. The regulation proposed will have the best chance for success in its hands." (pages 96, 97.)

House Document 89, 74th Congress, 1st Session, page 55.

"The British Royal Commission of 1930, which reported on the transportation situation in that country, came unanimously to the conclusion that the railroads could not alone be nationalized to advantage and that it would be necessary to include other forms of transport as well. Members who favored the principle of nationalization joined in this conclusion. It has also been the tendency in countries where the railroads are nationalized to give them at least a favored opportunity to engage in other forms of transportation." Beginning on page 201 of the same document, is a proposed motor carrier act.

None of the reports or recommendations of the Commission ever contained any suggestion of legislative re-

strictions against the development of a transportation monopoly under railroad control.

Policy of Congress

Congress had already restricted railroads with respect to control of competing water carriers, in the Panama Canal Act,[3] and had further restricted railroad control of water carriers in the Inland Waterways Corporation Act.[4]

When the Motor Carrier Act was under consideration the purpose of Congress to recognize and protect that type of transportation was made clear by the Transportation Policy which was then adopted, and further provisions were made against restraint of competition.[5] That Congress has no sympathy with the policy of regulated transportation monopoly was shown by placing both air carriers and certain water carriers under separate agencies, which are not related to the Interstate Commerce Commission.

The important question here is not whether the Commission is correct in its views respecting a regulated transportation monopoly or that Congress was wrong, but that the Commission has failed to comprehend that *Congress has neither adopted the views of the Commission nor authorized the Commission to experiment with them.*

Policy—Public Interest

The Commission in its reports, granting motor carrier rights to railroads, finds it to be in the public interest; that railroads be permitted to institute, own and conduct motor carrier operations; even though there is an abundance of independent motor transportation available; and refuse to cooperate with independent motor carriers. Then the Commission says, that it cannot believe that Congress intended to the contrary. That is the gist of this case, and undoubt-

[3] Interstate Commerce Act, Sec. 5(14), 54 Stat. 909.

[4] Inland Waterways Corporation Act, Sec. 3(d)(1), 49 U. S. C. A. 153.

[5] Interstate Commerce Act, Sec. 213, which was repeated in 1940 and re-enacted as Sec. 5(b).

edly explains the presence of collateral issues involving reasonable hearings for protestants, enforcement of provisions of the Motor Carrier Act, etc.

Apart from the academic merits of regulated transportation monopoly, and failure of the Commission to comply with several specific provisions of the Act, there is presented a question of policy making and administration, the pragmatic import of which can be illustrated and emphasized by a few suggested questions.

Can the inherent advantages of independent motor carriers be preserved, under a motor carrier schedule of rates, based as the Commission insists, on truck load quantities, in the face of competition from a railroad operated motor carrier operating under railroad rates, based on train load quantities which the Commission permits?

Can an independent motor carrier industry survive in the face of competition from a railroad operated motor carrier, which has a backlog of non-competitive traffic through which losses can be absorbed?

Can it possibly be consistent with the public interest that the existing normal oversupply of transportation facilities be augmented by the addition of 500,000 miles of railroad owned or controlled truck lines, without the usual criteria of public convenience and necessity?

Can the Commission possibly carry out the National Transportation Policy and regulate railroad motor transportation so as to prevent destructive competition, in the face of an exemption for the railroads from accounting requirements showing profits and losses while at the same time independent motor carriers are compelled to abide by rigid accounting requirements?

Can it be in the public interest, as a matter of policy, that each mode of transportation be authorized to supplement its service, particularly its deficiencies, by engag-

ing in every other mode of transportation, which may have some particular inherent advantages, and thereby augment the admitted oversupply of transportation facilities?

Many more equally important questions could be suggested, the answers to which would be equally apparent and subject to judicial notice, but these will suffice to bring to the Court's attention, the issues which are presented under the matter of jurisdiction to establish "policy". They are sufficient to illustrate to this Court that the Court below failed to comprehend the issues and was swept away in the miasma of "administrative discretion".

The fears which were expressed in Congress with respect to the "policy" of the Commission, when the Motor Carrier Act was being debated[6] have been the subject of Congressional observation since then.[7]

Development of the Policy

In this case the Commission has applied, with full force and effect, the policy which it has developed piece-meal, by a series of related proceedings involving the same subject matter. The Commission now proceeds on the theory that when a railroad desires to improve its railroad service by operating as both a railroad and a motor carrier, it is entitled to a motor carrier certificate as a matter of right.

This policy disregards the adequacy of existing motor carrier service; disregards the willingness and ability of existing motor carriers to coordinate their motor carrier operations and services with the railroad; disregards the effect of new and additional competition on the economic stability of existing independent carriers by motor vehicle; and disregards the statutory requirements for a fair and

[6]See appendix for legislative history.
[7]See appendix for Congressional criticism.

reasonable hearing and the statutory requirements for findings of facts.

When an independent motor carrier wishes to extend its line, to improve its service, it must prove public convenience and necessity by the normal criteria. A motor carrier must prove that existing service is inadequate and incapable of meeting the public need. When railroads apply for motor carrier rights the Commission has applied the criteria of railroad convenience.

The Commission has failed to recognize motor carriers as a completely distinct form of transportation and has regarded motor carrier service as merely a desirable adjunct to rail service.

Congress has recognized railroads, motor carriers and water carriers as distinct types of transportation agencies and has directed the Commission to preserve the inherent advantages of each. Congress has made it clear that the economic independence of each type of transportation must be preserved and has established a clear policy that there should be no monopoly of the various types of transportation by any transportation agency.

If a motor carrier, water carrier, or air carrier, determined that the construction and operation of a railroad would improve their service and result in some economies in connection with their respective operations, these carriers would certainly have to meet the normal tests of public convenience and necessity.

They would have to show that existing railroad service was inadequate to meet the public needs. They could not successfully contend that the railroad which they proposed to construct and operate would be some new or different kind of transportation or service, simply because it was owned by, and operated in connection with, water, motor or air carriers. But when the railroads apply for motor

carrier rights, the Commission has concluded that motor carrier operations conducted by and in conjunction with a railroad is something different from motor carrier operations conducted by independent motor carriers.

If, as the Commission assumes, it would be in the public interest to permit railroads to engage in a hybrid railroad—trucking business without proof of public convenience and necessity, then that is a matter which should be addressed to Congress for appropriate legislation.

Congress made no distinction as between applicants for certificates under the Motor Carrier Act, and the Commission is without legal authority to do so.

By way of explanation of the waiver of normal criteria for proof of public convenience and necessity, the Commission says that the service authorized is "something new"—"something different"—"a service different from either rail or motor carrier." The Commission knows that there already exists an abundance of motor, rail, express and forwarder service, and by no stretch of the imagination could public convenience and necessity be established for the duplication of those services. But the duplication is no less simply because it is done by the creation of hybrid operations.

This new service involves the use of more motor vehicles and more motor carrier certificates of convenience and necessity. Certificates for this new service are not issued on a showing of public need for more motor service, but are issued on a showing of railroad convenience and alleged improvement to railroad service. The operations are to be conducted by motor vehicles operated under railroad tariffs. No separate accounting for either expenses or revenue in connection with the motor operations are required. That is all to be scrambled with the railroad operating revenues and expenses. The service is not to be based on cost of rendering motor carrier service, but

is to be based on alleged savings in railroad operations. There is to be no means of testing the reasonableness of the rates or the reasonableness of the competitive practices.

It is new and different beyond a doubt and it is exclusively the policy of the Interstate Commerce Commission.

It is said that this new hybrid operation will not represent new competition, because it will only serve points already served by the railroads. About ninety-five percent of the population of the United States has some kind of railroad service. Can that much of the business in the United States be set aside by the Commission as "belonging" to the railroads, as a matter of policy? The Commission reasons that these points served by the railroads, have always been served by the railroads, therefore, all of that traffic is railroad traffic, and, if the railroads keep it, get it, or recapture it, that is not competition, because it was already railroad traffic.

The Commission appears to proceed on the theory that the ten to twenty percent of the total ton miles of national traffc, which the trucks are handling, belongs to the railroads, because it originates at points served by the railroads. Therefore, it is proper for the Commission to issue the railroads a certificate, by way of policy to get all of the traffic at all of the points served by all railroads. That may represent the kind of law which the Commission believes Congress should have enacted; but Congress rejected that theory, and directed the Commission to regulate the motor carrier industry as a separate and distinct transportation agency.

This is the setting in which the Commission regulates the motor carrier industry and grants certificates of convenience and necessity for motor carrier rights to railroads. The Commission has not exercised its administra-

tive discretion within the frame of the law which it administers.

Courts Will Insist Upon the Observance of Statutory Standards

This Court has reversed the Commission because, in the disposition of matters which normally involve only the exercise of administrative discretion, the Commission had proceeded under a misconception of its statutory duties and powers and disregarded proper legal criteria. That being the issue in this case, it is appropriate to point out wherein the Court has insisted that the Commission act with a proper appreciation of applicable legal criteria and its statutory duties and obligations.

In the Carolina Freight Carriers[9] case this Court reversed the Commission because it appeared that the Commission may not have acted with proper understanding and appreciation of controlling legal principles and statutory requirements. The Commission imposed restrictions on irregular route common carriers which it had not imposed on regular route common carriers. The Commission acted within what it deemed to be its administrative discretion. In setting the order aside, this Court said:

> "Congress has made no such distinction between them and irregular route carriers like appellee."

In the case at bar, the Commission has assumed that there is some fundamental difference between motor carrier operations conducted by a railroad and motor carrier operations conducted by independent motor carriers and the Commission proceeded to apply different criteria for public convenience and necessity. Congress has made

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[9] *Carolina Freight Carriers Corp.* v. *United States*, 315 U. S. 475, 86 L. ed. 971. Decided March 2, 1942.

no such distinction and the Commission may not lawfully do so.

We contend that the Commission was in error in assuming that it had jurisdiction to legislate a distinction between rail and motor applicants and apply different criteria for the proof of public convenience and necessity. That issue does not involve any matters committed to the discretion of the Commission.

This Court said;

> "We would not disturb those conclusions if only a question as to the weight of evidence was involved. But we are not satisfied that the Commission applied the proper criterion in reaching its conclusion • • •."
> "But we conclude that there is no statutory warrant for applying to irregular route carriers a different or stricter test as to commodities which may be carried than is applied to regular route carriers."

Here, appellants contend that there is no statutory warrant for a different or more liberal treatment of a railroad owned motor operation than that applied to independently owned motor carrier operations with respect to the required proof of public convenience and necessity.

In further analyzing the reasoning of the Commission, and in safeguarding private rights, this Court said:

• • •

> "To appellee such matters involve life or death."

Appellants here contend that the issues here are matters involving life or death to independent motor carriers.

In further criticism of the Commission's substitution of conclusions for findings, the Court said:

> "It is impossible to say that the standards which we have set forth were applied to the facts in this record. Hence, as in *Florida* v. *United States*, 282 U. S. 194, 215, 85 L. ed. 291, 304, 51 S. Ct. 110, the defect is not

> merely one of the absence of a 'suitably complete statement' of the reasons for the decision; it is the 'lack of the basic or essential findings required to support the Commission's order.' And see *United States* v. *Baltimore & O. R. Co.* 293 U. S. 454, 464, 79 L. ed. 587, 594, 55 S. Ct. 268; *United States* v. *Chicago, M. St. P. & P. R. Co.* 294 U. S. 499, 510, 511, 79 L. ed. 1023, 1031, 1032, 55 S. Ct. 462."

Here, appellants contend that the Commission failed to make the basic or essential findings required to support its order, but also failed to conduct a proper hearing and failed to hear and receive evidence essential to the making of proper findings.

This Court further said:

> "Congress has prescribed statutory standards pursuant to which those rights are to be determined. Neither the Court nor the Commission is warranted in departing from doubts which may exist as to the wisdom of following the course which Congress has chosen."

Here, appellants contend that the Commission has departed from the standards prescribed by Congress and has undertaken to prescribe its own policy, and has concluded that it was not wise for Congress to subject railroads to the same standards of proof of public convenience and necessity, which the Commission has insisted upon in the case of independent motor carriers.

Appellants are reluctantly forced to conclude that the hearings which the Commission now holds on any railroad application for motor carrier rights are a farce. The matter has reached the point where no possible evidence could serve to show adequate existing services. No possible evidence could serve to overcome railroad desire and railroad convenience. The "hearings" are in effect, ex parte.

This Court further said:

> "Congress has also provided for judicial review as an additional assurance that its policies be executed. *That review certainly entails an inquiry as to whether the Commission has employed those statutory standards.* If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory process." (Italics ours)

Again addressing itself to the matter of vague and indefinite findings and theories, this Court said:

> "If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made prerequisite to the operation of its statutory command." "

Appellants contend that the Commission has disregarded and obscured compliance with the statutory commands and that erroneous statutory construction lies hidden in vague conclusions pursuant to a policy which the Commission has substituted for essential and basic findings.

This Court made clear the distinction between the observance of statutory standards and the question as to whether the findings are supported by the evidence, and said:

> "Hence that requirement is not a mere formal one. Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence. That is why we cannot say that the Commission would be justified in placing the same restrictions on the certificate in this case had a correct construction of the Act been taken.
> "We express no opinion on the scope of the certificate

which should be granted in this case. That entails not only a weighing of evidence but the exercise of an expert judgment on the intricacies of the transportation problems which are involved. That function is reserved exclusively for the Commission. *United States* v. *Maher*, 307 U. S. 148, 83 L. ed. 1162, 59 S. Ct. 768, supra; *Alton R. Co.* v. *United States*, 315 U. S. 15, ante, 378, 62 S. Ct. 432, supra. Our task ends if the statutory standards have been properly applied."

Here, plaintiff contends, that the Commission has not applied the statutory standards and that it has substituted a policy unknown to the law by which it grants certificates of convenience and necessity to railroads to conduct motor carrier operations.

Plaintiffs do not request the Court to substitute its judgment for that of the Commission on the weight to be given evidence. But plaintiffs do request the Court to find that the Commission failed and refused to conduct a proper hearing and to receive evidence which was essential to meet the requirements of statutory findings. Plaintiff further asks the Court to find that the Commission substituted conclusions, without evidence, in lieu of the findings required by law.

Substitution of Conclusions for Findings

In the *Yonkers* case[10] this Court reversed the Commission because the Commission substituted its conclusions for the jurisdictional findings required by statute.

In dealing with mixed question of law and fact the Courts and not the Commission have the final say.

"As stated by Mr. Justice Brandeis in *United States* v. *Idaho*, 298 U. S. 105, 109, 80 L. ed. 1070, 1074, 56 S. Ct. 690, the determination of what is included within the exemption of § 1 (22) involves a 'mixed question

[10] *Yonkers* v. *United States*, — U. S. —, 88 L. ed. 241. Decided Jan. 3, 1944.

> of fact and law.' Congress has not left that question exclusively to administrative determination; it has given the courts the final say. • • • And the fact that the Commission fails to make a finding on this jurisdictional question obviously does not preclude the reviewing court from making that determination initially. But we deem it essential in cases involving a review of orders of the Commission for the courts to decline to make that determination without the basic jurisdictional findings first having been made by the Commission."

Here, appellants contend that the standards to be applied by the Commission in determining convenience and necessity, and the power of the Commission to treat railroads differently from the standards applied to independent carriers is a mixed question of law and fact subject to judicial determination.

In the *Yonkers* case the Court was dealing with matters involving a conflict between national and local interests, and said:

> • • •
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> "We are asked to presume that the Commission, knowing the limit of its authority, considered this jurisdictional question and decided to act because of its conviction that this branch line was not exempt by reason of § 1(22). But that is to deal too cavalierly with the Congressional mandate and the local interests which are pressing for recognition."
>
> • • •
>
> "This is not to insist on formalities and to burden the administrative process with ritualistic requirements. It entails a matter of great substance. It requires the Commission to heed the mandates of the Act and to make the expert determinations which are conditions precedent to its authority to act."

Insofar as the duties and powers of the Commission are concerned there is little, if any, difference between its

observance of statutory mandates in cases involving national and local interests, on the one hand, and cases involving the interests of competing transportation agencies, such as railroads and motor carriers.

In a recent case *Eastern-Central Motor Carriers,*[11] this Court reversed the Commission for failure to appreciate its obligations in matters affecting competing transportation agencies and in substituting conclusions for findings.

That case involved an order of the Commission denying to independent motor carriers the right to publish rates based on quantities similar to quantities upon which railroad rates were based.

Acting within what it conceived to be its administrative discretion, the Commission sought to limit motor carriers to quantity weights which could be transported on a single truck. In so doing the Commission disregarded the competitive disadvantage which such an order would place the independent truck lines in competition with the railroads. When the Commission considered the matter it made frequent reference to a "policy" which it had adopted or proposed to adopt. This Court observed:

> "Whether this policy is now intended to apply to all forms of transportation, rail, motor and water, without regard to competitive conditions affecting two or more of them, is not clear from the abbreviated reports made in this case. But their casting of the matter in terms of unqualified policy, dependent only upon proof of the required reduction in operating costs, gives both appearance and substance to the view this may be true, if not with respect to all carriers, then certainly with reference to motor carriers."
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> * * *
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> "In returning the case we emphasize that we do not question the Commission's authority to adopt

[11] *Eastern-Central Motor Carriers Association* v. *United States,* —U. S. —, 88 L. ed. 431. Decided February 7, 1944.

and apply general policies appropriate to particular classes of cases, so long as they are consistent with the statutory standards which govern its action and are formulated not only after due consideration of the factors involved but with sufficient explication to enable the parties and ourselves to understand, with a fair degree of assurance, why the Commission acts as it does. Cf. United States v. Carolina Freight Carriers Corp. 315 U. S. 475, 488, 489, 86 L. ed. 971, 982, 983, 62 S. Ct. 722. Observance of this requirement is as necessary when an established policy is being extended to new and significant situations as when a new policy is being formulated and applied in the first instance. We do not undertake to tell the Commission what it should do in this case. That is not our function. We only require that, whatever result be reached, enough be put of record to enable us to perform the limited task which is ours."

In that case the Commission sought to substitute a policy or a conclusion for observance of statutory standards and basic findings and was reversed by this Court, as it had on other occasions.[12] In the case now at bar, the Commission would accomplish the same preferential treatment of railroads by authorizing them to conduct motor carrier operations under railroad tariffs, while compelling independent motor carriers to operate under restricted motor carrier tariffs.

As a result of its misconception of its duties and powers, the Commission has failed to administer the Act in accordance with the intent of Congress and has substituted its policy for the findings required by the Act. That was the reason for the United States confessing error and asking that judgment be entered for the plaintiffs.[12a]

It may be that inquiry with respect to policy involves some of the difficulties which beset the searching of con-

[12] *U. S. v. Chicago M. St. P. and P. R. Co.*, 294 U. S. 499, 79 L. ed. 1023.
Florida v. *U. S.*, 282 U. S. 194, 85 L. ed. 291.
U. S. v. *Baltimore and Ohio R. Co.*, 293 U. S. 454, 79 L. ed. 587.

[12a] R. 172.

science, however both leave tell-tale tracks. Those tracks may here be found in the admissions contained in the reports, in failure to conduct fair and reasonable hearings, in failure to make the requisite statutory findings, and in failure to apply fair and impartial regulations.

Point 2—Waiver of Proof of Public Convenience and Necessity. The Commission is Without Jurisdiction and Power to Adopt a "Policy" of Waiving the Normal Criteria of Proof of Public Convenience and Necessity in Connection with Issuance of Motor Carrier Certificates to Railroads and the Substitution Therefor of a Test of Railroad Convenience.

To illustrate this point, we first trace the policy applied by the Commission in cases involving construction of railroads; then we trace the policy where independent motor carriers apply for certificates, and then we trace the policy which the Commission has pursued in granting certificates to motor carriers controlled by railroads.

A comparison of these parallel cases discloses that in the case of railroad applications for motor carrier rights, the Commission has departed from the statutory standards prescribed by Congress and has failed to apply the normal criteria and in effect has legislated into the Act distinctions which Congress did not make.

The pertinent provisions of the Transportation Policy, certificate provisions Sec. 206a, 207(a) and 208(a); and the provisions covering unification and mergers, Sec. (Old) 213, Sec. 5(b), are set forth in the appendix hereto.

Proof Required of Railroads To Construct Railroads

In a number of railroad cases, the Commission has shown full appreciation of the criteria to be applied in determining public convenience and necessity.

The position of the defendants is so much at variance with Commission decisions in railroad cases, we think it worthwhile to set forth a few citations on this subject.

> "The intervening railroad companies point out that their lines or portions of them parallel to some extent the proposed line of railroad or serve a part of the same territory, providing almost an overabundance of railroad transportation, and that the territory involved is completely and adequately served by them.
>
> • • • •
>
> "Upon the record the applicant has failed to show that the territory is now deprived of adequate railroad transportation or that there is a public need for the line proposed."
>
> *Ray Greenes Proposed Construction,* 228 I.C.C. 792-3, 794.
>
> "As hereinbefore noted the territory appears well provided with sufficient and adequate service by existing railroads."
>
> *Elizabeth Southern Ry. Proposed Construction,* 166 I.C.C. 114.
>
> "'The new road would doubtless be of service to stock raisers and dealers in furnishing quicker transportation to and from ranges. • • • As compared with present service via the Southern Pacific it would furnish quicker passenger service and save time on express, perishables and other freight inbound and outbound between Westwood and California points.
> "No new territory would be opened that could not
>
> • • •
>
> be served by existing carriers."
>
> *Proposed Construction by Northern California R. Co.,* 154 I.C.C. 410.
>
> "Another feature of this case in itself sufficient to condemn the proposal is the relationship between the applicant and the cement company. Most of the ap-

plicant's traffic would be furnished by the industry which controls it. The undesirability of this from the standpoint of the public and connecting carriers is apparent."

Proposed Construction of Line by Perry & Southeastern Ry., 124 I.C.C. 346.

"Authority to construct the proposed new line will not be granted until we are fully satisfied that a use of the existing rail routes between the Ohio River and the Youngstown district which will produce substantially the results proposed by the applicant is impracticable."

Construction of Branches by Pittsburgh L. & W. R. Co., 150 I.C.C. 43, 150 I.C.C. 619.

"I am not in sympathy with the idea that a carrier can have anything resembling a proprietary interest in traffic or that there is any traffic here for example which 'belongs' to the Pere Marquette or that can properly be spoken of as 'its' traffic."

Proposed Construction by G. R. & I. Ry. Co., 145 I.C.C. 564.

"The record does not indicate any urgent need or at present any great public convenience to be served, to justify at this time the construction of the proposed line of railroad. Del Rio & Eagle Pass and the districts surrounding those municipalities are served by the Southern Pacific and the service is generally satisfactory".

Del Rio & N. Ry. Co. Proposed Construction, 187 I.C.C. 244.

"While one of the purposes of the Transportation Act of 1920 was to preserve competition between carriers; the provisions of paragraphs (18) to (20), inclusive, of section 1, negative any presumption that it was the purpose of Congress to permit the construction of new and competitive lines of railroads where existing facilities are adequate or can be made so by the exercise of available administrative remedies."

Public Convenience, Application of Utah Terminal Ry., 72 I.C.C. 94.

We have cited these railroad cases to demonstrate that when a railroad seeks to build a new line, the Commission has consistently decided that the question of public convenience and necessity requires consideration of existing adequate railroad service. The last citation above indicates a complete agreement by the Commission with the congressional intent on that score.

Proof Required of Independent Motor Carriers

The Commission has consistently adhered to rigid requirements with respect to the proof that must be offered by independent motor carriers in order to establish public convenience and necessity. Outstanding among these requirements has been the demand that the applicant must show either that there is no existing service or that the existing service fails to meet the public requirements and that the public needs the additional service proposed by the applicant.

Mere carrier convenience or mere improvement of the service of a particular carrier has not been deemed sufficient to establish public convenience and necessity, particularly if the result is additional competition.

Applicants have also been required to show that existing carriers cannot supply the deficiency in existing service.

Implicit in the statute and in the decisions is the holding that an applicant must show that the proposed service "will be required by the (1) public *convenience* and (2) public *necessity*. Proof of one of those elements is not treated as proof of the other. In an early motor carrier case (1937) the Commission said:

> "There is no showing that there is a substantial public demand for applicant's services or that the existing transportation facilities are inadequate to

efficiently serve the needs of the public. *The evidence does not disclose that applicant proposes to institute a service of such character that it cannot be supplied or performed by carriers who may have established rights in the considered territory.* Obviously the considered operations are for the convenience of applicant rather than for the convenience of the public." *Rolfsmeyer Common Carrier Application*, I M.C.C. 652 (Italics ours).

In another case the Commission found that an applicant seeking to establish a new service between Chicago and Detroit was attempting to invade a territory served by a great many existing lines. After commenting on the fact that the applicant had been operating and had secured some traffic, it pointed out:

> "*No claim is made that adequate facilities for transportation are not now available in the particular territory involved.* Preference of a shipper for the service of a certain operator does not establish the need for such service on the part of the shipping public to be served, as required to be shown by the provisions of the Act." *Merrill & Hamel, Inc., Common Carrier Application*, 8 M.C.C. 117 (Italics ours).

Those early cases have since been followed by many other decisions that repeat and strengthen this interpretation.

The Commission held in other early cases that the applicant has the burden of showing that the existing service is not adequate,

> "Where a certificate is sought in the transportation of commodities generally and to serve a public already served by railroad, express and motor carrier, the burden of proof is upon applicant to show that the latter are not rendering a type or character of service which satisfies the public need and convenience and that the proposed service would tend to correct or substantially improve that condition." *Norton Common Carrier Application*, 1 M.C.C. 114.

"The fact that in isolated cases the present operating bus line was unable to carry passengers on scheduled trips is not a sufficient basis to justify the Commission in granting a certificate of public convenience and necessity to another bus line, *unless it is shown that the present bus line, railroads and steamship facilities are inadequate and inconvenient to the traveling public, and that the proposed facility would eliminate such inadequacy and inconvenience.*" *Blue Nose Bus Co. Common Carrier Application*, 1 M.C.C. 173 (Italics ours).

"Aside from a willingness and ability to engage in the operation of motor vehicles as a common carrier, under the provisions of the Act, there must be an affirmative showing that the service is not only required in the convenience of the public proposed to be served, but that it is a necessity on the part of such public. *The latter element includes a showing that the present facilities are inadequate for the transportation of the described commodities between the points involved.*" *George Edmund Jackson, Common Carrier Application*, 7 M.C.C. 656, Decided June 3, 1938, 1 F.C.C. 205. (Italics ours).

"The substantial question here is whether the evidence establishes that continuance of applicants' service is required by the public convenience and necessity. We are of the opinion and find that it does not. *The present bus and rail service of protestants described above appears to be adequate for all purposes. Those carriers have been rendering service in the territory for some time, and, in the absence of any evidence that their service is unsatisfactory or deficient in any respect, or that applicants' service is required by the transportation needs of the public residing in the territory served we are not convinced that there are sufficient grounds for permitting applicants to continue their present operations.*" *White Circle Line Common Carrier Application*, 1 M.C.C. 585 (Italics ours).

Those principles which were laid down by the Commission early in the administration of the Motor Carrier

Act, have been consistently followed in all cases involving applications by independent motor carriers for the transportation of general commodities.[13]

State Court Decisions

There are a number of decisions by State Supreme Courts on the question of what is required to prove public convenience and necessity. While all state statutes are not precisely the same, the use of the term "public convenience and necessity" has been common. In substance, the state courts have held that an applicant must show either an absence of motor carrier service or that such service is inadequate. In case after case the courts have said that if there is reasonably adequate service already in the field, a new certificate cannot be granted.[14]

A number of the cases specifically hold that it is not enough to show that the public convenience will be served to some extent by the proposed operation. The Courts

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[13] *Davidhizer Common Carrier App.*, 7 M. C. C. 133;
Clark Common Carrier App., 1 M. C. C. 445, 448;
Wellspeak Common Carrier App., 1 M. C. C. 712, 715;
Podolsky Contract Carrier App., 2 M. C. C. 653, 654;
Lake Champlain Transport Lines Contract Carrier App., 4 M. C. C. 125, 128;
Motor Exp. Inc. Contract Carrier App., 11 M. C. C. 127, 129;
Georgia Motor Exp. Inc. Common Carrier App., 10 M. C. C. 159, 164;
Rabinowitz Common Carrier App., 4 M. C. C. 587, 588;
Rolfsmeyer Common Carrier App., 1 M. C. C. 651;
Brundage Common Carrier App., 11 M. C. C. 187, 190;
Carpenter Common Carrier App., 17 M. C. C. 693, 697;
Sullivan Common Carrier App., 18 M. C. C. 19, 20-21;
Karsen Contract Carrier App., 31 M. C. C. 613, 616;
Stucki Wittwer, 34 M. C. C. 756, 759;
System Freight Service, 28 M. C. C. 407, 410;
Rutland Common Carrier App., 27 M. C. C. 531, 532-533.

[14] *Chicago Motor Bus Co.* v. *Chicago State Co.*, (1919) 287 Ill. 320;
Choate v. *Commer Commission*, (1923) 309 Ill. 248;
Egyptian Transportation System v. *L. & N. R. Co.*, 321 Ill. 580;
Superior Motor Bus Co. v. *Community Motor Bus Co.*, (1926) 320 Ill. 175;
Cincinnati Traction Co. v. *Public Utilities Com.*, (1925) 112 Ohio St. 699;
Coney Island Motor Bus Corp. v. *Public Utilities Com.*, (1926) 152 N. E. 25.

have pointed out that there must be a showing that the public necessity also requires the service.[15]

In an Ohio case the Court, in interpreting the phrase "public convenience and necessity", said:

> "Perhaps it will not do to give the word 'necessity' its literal meaning and hold that, before a certificate can issue, there must be an absolute requisite for a motor transportation service; but it must not be wholly devitalized by interpreting it as synonymous with convenience. *Necessity, perhaps, in its reference to transportation facilities, may best be construed as contemplating a definite need for a public transportation service in a territory where no reasonable adequate public service exists.* It does not contemplate that every prospective customer may have a non-stop service from the point where he becomes a passenger to the point of his destination, nor that he may have an airline between such points, but only that the public generally, in every territory sufficiently populous to justify the maintenance of a public transportation, shall have reasonably adequate service." *Canton East Liverpool Coach Co.* v. *Public Utilities Com.*, 123 Ohio St. 127 (Italics ours).

In an Illinois case we find a good expression of the general rule.

> "To authorize an order of the Commerce Commission granting a certificate of convenience and necessity to a carrier though another is in the field, it is necessary that it appear, first, that the existing utility is not rendering adequate service and it is but a matter of fairness and justice that it be shown that the new utility is in a position to render better service to the public than the one already in the field. It is in accord with justice and sound business economy that the utility already in the field be given an opportunity to furnish the service where it offers and is able to do

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[15] *Cooper* v. *McWilliams and Robinson*, (1927) 221 Ky. 320; *Barnes* v. *Consolidated Coach Corp.*, (1928) 223 Ky. 465; *Lykins* v. *Public Utilities Commission*, (1926) 115 Ohio St. 376.

so." *Chicago R. Co.* v. *Commerce Commission,* 336 Illinois 51.

In an Oklahoma case the Court said:

> "It should be made to appear that the inconvenience of the public occasioned by the lack of motor carrier transportation is so great as to amount to a necessity." *C. R. I. & P. Ry. Co.* v. *State,* (Oklahoma) 252 P 849.

This is a case of first impression before this Court, involving railroad applications for motor carrier rights. The only parallel case that we know of, is the decision by the Ohio Supreme Court in *New York Central Railroad Company* v. *Public Utilities Commission,* 123 Ohio St. 370; 175 N. E. 596.

The railroad filed an application for an intrastate certificate which was denied. In setting forth the contentions of the railroad, the Court said:

> "The contention that the finding and order of the Commission is unreasonable and unlawful is based principally upon the claims: (1) That the Commission should have considered the substantial economy to the railroad, and the resulting benefits to the public, which it refused to do. * * * It is disclosed that the real basis of the applicant's claim for a certificate is that the motor truck line which it would operate there under would be an auxiliary to its existing railroad line between the points named. Indeed, its application is based upon the claim that its operation of such a motor truck line over such route would result in better service at an ultimately less cost to the public." (p. 103)

After discussing the facts with regard to existing motor carrier service and the prior Commission and Court decisions, the Court said:

> "The applicant contends that this truck operation service should be authorized because it is not an isolated independent operation between points named,

but is rather a companion service to the service which it provides by rail, and in fact is a substitute for the local freight service formerly operated by it; further that such truck operations are confined to the movement between stations on the line of the railroad, where merchandise is received and delivered; that such operation involves no pick-up or delivery service and is thus made a mere substitute for a more costly local freight train service; further that the proposed operation is not in competition with the business of any existing motor transportation line, in that if this freight were not hauled by truck by this applicant it would be carried by its freight trains; and, further, that the major portion of the shipments handled by it are interstate shipments and cannot be readily separated from intrastate shipments." (p. 105)

In disposing of these arguments the Court said:

"These and other arguments made by the applicant should be addressed to the legislature rather than to the Public Utilities Commission and this court. The New York Central Railroad Company as an applicant for a certificate of convenience and necessity to operate a line of motor trucks over the highways of the state, and thereby transport freight from place to place within the state, is in no better or different position under the statute than any other applicant for such right and privilege. Under the statute there can properly be no discrimination in its favor, just as there can be no discrimination against it. It is the duty of the Commission under the statute in every case to take into consideration other existing transportation facilities in the territory for which a certificate is sought, and where it appears from the evidence that the service furnished by existing transportation facilities is reasonably adequate the Commission should refuse the application.

"This case as presented is exactly the same as it would be if the application were filed by any motor truck transportation company for a certificate covering territory fully and adequately served by duly certified operators. The test of public convenience

and necessity must be applied whether the applicant for a certificate to transport freight over the public highways of the state is a railroad company seeking to inaugurate so-called supplemental freight service over the public highways, or an exclusively motor transportation company. The rule to be applied under existing statutes is the same and must be uniformly and unversally applied and enforced. The best interests of and the most efficient services to the public do not require a greater number of motor trucks upon the highways of the state than are necessary to supply the public need for such transportation. The public benefit and not private benefit is of first and foremost importance." (p. 105-6)

At another point, in discussing this same question, the Court said:

"Construing these statutes, this court has frequently held that the granting of an application for such certificate is not warranted unless it appears that the public necessity and convenience require the proposed service, and, further, that another motor transportation company, if any, holding a certificate of convenience and necessity granted it by the Public Utilities Commission, covering the same route, is not rendering adequate service, and is not able, ready, and willing to provide the additional service, if any, found to be necessary." (p. 103-4)

The Court made a most pertinent observation when it pointed out that all of the arguments advanced by the railroad should have been addressed to the legislature. The Court in that 1931 case has very clearly set out the answer to every contention made by the railroads in this case.

In a State Commission decision in which a railroad was granted the right to inaugurate a stage line, the dissenting opinion, reviewed the railroad arguments and said:

"Under this pronouncement, authorization for the substitution by the rail carriers of rail transportation

by stage transportation will be a mere matter of routine and presumably the requested authority will be granted by ex parte orders, as no real need will exist for a public hearing." *Re Southern Pacific Motor Transport Company P. U. R.* 1929 A, (p. 204).

This statement fits the rule laid down by the Interstate Commerce Commission. The only test the railroad must meet is whether it wants the certificate, if the Commission's order is permitted to stand. It does not seem to have occurred to the Commission that the refusal of the railroads to make use of existing service and their refusal to bestow this alleged benefit upon the public on any terms except their own, is not proof that the public convenience and necessity requires the grant of the certificate. It has not been able to see with the clarity of the Ohio Supreme Court. If it had it would have observed, as did the Oklahoma State Commissioner, that there is no longer need for a hearing on any railroad application.

In the Case of Railroad Applicants for Motor Carrier Rights the Commission Has Departed From the Legal Standards of Proof of Public Convenience and Necessity.

On this question the full Commission's policy and the Motor Carrier Division's anaylsis of facts have not reached consistent results. The full Commission has now definitely crystallized a policy which plaintiffs contend is clearly contrary to law.

The Motor Carrier Division of the Commission recognized that it did not have the power to establish a different standard of proof for railroad applicants for motor carrier rights. In a case involving a railroad owned motor carrier, *Pennsylvania Truck Lines Extension*[16], the Division said:

[16] 34 M. C. C. 828 (decided July 23, 1942). (Full decision not published.)

"The purpose of this extension is to enable applicant to perform substituted service for the railroad in the handling of less than carload shipments between Dayton and Middletown, moving at rail rates and on rail billing * * *."

* * * * * * *

"Several shipper witnesses testified to a need for resumption of the service and it is clear that a public need exists for the performance of a substituted less than carload rail service between Dayton and Middletown."

* * * * * * *

"Conceding this public need, the controlling question is whether there is already available a motor carrier ready, able and willing satisfactorily to supply such service for the railroad. If so, there is no need for applicant's added service in this respect."

* * * * * * *

"There is no showing such as we have had in some cases, that the railroad would experience any difficulty whatever in coordinating its service with that of Continental. The past satisfactory performance by Continental of the identical service definitely negatives any such claim."

The only difference between the case above cited and quoted and the case at bar, is that in the cited case the applicant was a wholly owned railroad motor carrier subsidiary; whereas, in the case at bar the Seaboard Air Line directly and without the intervention of a subsidiary, applied for the rights.

The full Commission does not follow the sound policy set forth by the Division in the *Pennsylvania Truck Line* case, and the full Commission now grants rights to both railroads and railroad subsidiaries as a matter of policy and without requiring proof of convenience and necessity and without regard for the adequacy of existing services.

The Commission and the Division have not been consistent in their holdings and it follows that the Commission's order does not stand clothed with the doctrine of "administrative rulings long and consistently applied."

Crystallization of the Doctrine Which the Full Commission Now Applies to Railroads.

The doctrine of "railroad convenience" as distinguished from "public convenience and necessity" began to crystallize in the Kansas City Southern case[17]. Later the full same issues. Included in the consolidation where the several applications by the Seaboard Air Line Railway, intervenor here.[18]

In the first *Kansas City Southern* case (10 M. C. C. 221), Division 5 said:

> "Applicant is a wholly owned subsidiary of the Kansas City Southern Railway Company." (p. 222).

The report recites the terms of an agreement between the railroad and Herrin Motor Lines under which Herrin, an independent motor carrier, had performed this service for the railroad.

> "The agreement recites that applicant handles freight under rates filed with the Louisiana Public Service Commission between points on the line of the Kansas City Southern Railway Company and desires to engage the services of Herrin in transporting certain freight between the depots used by applicant. Herrin is required to provide at its sole cost and expense adequate forces and equipment for prompt movement of the freigh and equipment of 10,000 pounds carrying capacity, having inside dimensions

[17] *Kansas City Southern Transport Co., Inc.—Common Carrier Application*, 10 M. C. C. 221. Decided Nov. 12, 1938.
Commission consolidated a number of cases involving the

[18] *Kansas City Southern Transport Co., Inc.—Common Carrier Application*, 28 M. C. C. 5. Decided Jan. 24, 1941. (Including Seaboard Air Line Railway Company, Dockets MC 61438 and Subs 1 to 10, inclusive; and Subs 15 and 18.)

of 18 feet in length and 7 feet in width and height is specified; * * * employees of Herrin are to load and unload at all points * * * one schedule each way daily * * * is required; applicant is given the right at times convenient to Herrin to check Herrin's records for the purpose of verifying the correctness of charges made and credits allowed by Herrin; Herrin is required to release from its service any employee objectionable to applicant; * * *.

"In addition the agreement states in detail the responsibilities which are to be assumed by Herrin. Herrin agreed to indemnify and hold harmless the applicant from and against all loss, damage, costs, and expenses incurred on account of injuries to persons and loss of, or damage to, freight. Herrin further agreed to procure and keep in force public-liability and property-damage insurance on all vehicles used by it. * * * This blanket insurance covered the loss of, and damage or delay to, freight, issuance of false or fraudulent receipts or bills of lading, theft, embezzlement, and loss by robbery." (pp. 223, 224).

The Kansas City Southern Railroad later desired to extend the truck service and proposed to do so through a wholly owned subsidiary, and for that purpose made an agreement with its subsidiary as follows:

"By an agreement, dated May 12, 1933, between the railway and applicant, the railway agreed to permit applicant the joint use of its freight stations, facilities, and station agents. Applicant agreed to pay the railway a percentage of its gross transportation revenue and, in addition thereto, a percentage of the net income remaining to applicant after deduction of costs of operation. * * * It was further agreed between the parties that the railway assumed no liability to shippers for loss, damage, or delay to property transported by applicant." (p. 225).

This agreement was supplemented in part as follows:

"By supplemental agreement dated August 4, 1935, certain additional provisions were made specifically applicable * * *

"The Railway Company shall also furnish entire supervision of all of the Transport Company's affairs and operations, the solicitation of business for the Transport Company, station services of every character, including the execution of bills of lading, way-billing of shipments, the collection and remittance of transportation charges, the preparation of all general and station records and reports, the performance of all general and station accounting and generally to supervise the conduct and management of the business of the Transport Company." (p. 225)

The report next describes the motor carrier operations which the railroad proposes to conduct through its motor carrier subsidiary, and states:

"It is also proposed, however, to substitute truck operations for the present rail station-to-station way-freight service. Substitution of trucks for this service will result in the handling of certain traffic entirely by truck. Applicant and the railway contend in this connection that they cannot accord the service proposed, if only traffic which has received a rail haul to or from a key station is handled by applicant, and the intermediate station-to-station service is still performed by a way-freight train. Shipments moving a substantial distance will be handled wholly by truck only when the volume of the traffic is too light to make up a merchandise car between the points. Applicant is willing that any authority issued shall contain appropriate provisions limiting continuous handling by truck to a maximum distance of 250 miles. The railway operates over approximately 878 miles of track and maintains 93 agency stations." (pp. 226, 227).

The next portion of the report recites that the railroad has been able to increase its traffic by combining rail and motor service:

"In August 1935 experimental operation through applicant in the handling of merchandise traffic between Shreveport and Lake Charles entirely by motor vehicle was undertaken. Since the commencement of

this operation the less-than-carload traffic in that territory has increased over 60 percent, as compared with a 15-percent increase over the entire line of railway. The railway concludes therefore that the best method of saving its less-than-carload tonnage would be by the institution of coordinated rail-truck service over its entire line."

* * * * * * *

"A number of shipper witnesses testified that they prefer to use the railway's service to the greatest extent possible, because of the single responsibility involved and the maintenance of regular stations for the receipt, delivery, and storage of shipments. However, some of these witnesses, who are distributors of various commodities from Kansas City, pointed out the inadequacy of the present rail service which is compelling them either to narrow the territory of their operations or resort to other means of transportation." (p. 230).

The report next describes the improvements in railroad service which would be brought about by the use of trucks and the savings which the railroad would make if it substituted trucks (pp. 230, 231).

The next portion of the report discusses the service available to the public by independent motor carriers and the points they serve, together with certain statements respecting the quantity of equipment available (pp. 231, 232).

The report next recites the applicant's contention that the service, which they propose to offer is a new service, different from either rail service or truck service (p. 232).

The applicant railroad objects to cooperating with independent truck lines:

"Applicant suggests that the railway could not be expected, and would not be willing, to turn over its traffic at key points or between local stations to its direct competitors who would be primarily interested

in attempting to divert such traffic to their own truck lines for the longest possible haul. * * * Applicant emphasizes the argument that even if the railway were willing to establish joint rates or through routes with protestants, the rail connections of the railway could not be expected to do so." (pp. 232, 233).

The report next discusses the position of the protestants:

"Protestants are of the view that entry of applicant into the proposed territory as a transportation factor would mean loss to present motor carriers of a substantial volume of business. They assert that applicant, if given the full financial support of the parent rail company, could attract business that it would not secure logically or naturally, and that it could in a short time produce confusion that would reduce present motor carriers to a position of subserviency to the rail carriers. Protestants urge that the independence of motor carriers from the rail carriers must be maintained, if the inherent advantages of motor-carrier transportation are to be preserved. It is contended that the present motor-carrier service in the territory is entirely adequate; that institution of the proposed service would not improve the service that might be offered by coordination of existing motor and rail services; and that applicant has failed to sustain its burden of showing public need for the proposed operations."

* * * * * *

"Protestants emphasize the fact that the railway has not requested them to join in any plan of coordinated rail-truck service. They believe that, if it be considered that the proposed service is required by the public convenience and necessity, the present truck operators should be granted the privilege of attempting to coordinate their service with the rail line. It is urged that present motor carriers are entitled to such opportunity before it is assumed that such coordinated rail-and-truck service is not feasible and practicable." (p. 233).

The report next discussed a number of Supreme Court decisions and in the conclusions said:

> "The only substantial question is whether it has been shown that the proposed service 'is or will be required by the present or future public convenience and necessity.'"

The report then cited some Commission decision wherein certain decisions by this Court were referred to and quoted. (Appellants will discuss these Supreme Court cases later.)

The Division then said:

> "Moreover, it is clear that this coordinated rail-motor service will be *a new form of service,* utilizing both forms of transportation to advantage, and differing from the service given by the railway alone or by competing motor carriers alone. That Congress contemplated such coordination is shown by section 202(a) of the act, which declares it to be the policy of Congress, among other things, to 'improve the relations between and coordinate transportation by and regulation of, motor carriers and other carriers.' It is also shown by section 213(a)(1), which permits a railroad to acquire a motor carrier, provided we find that the acquisition will promote the public interest by enabling the railroad to 'use service by motor vehicle to public advantage in its operations', without undue restraint of competition."[19]

The report next discusses the *refusal* of the railroads to cooperate with independent motor carriers and points out that while the Act permits joint rates between railroads and independent motor carriers the Commission does not have the power to require their establishment (pp. 235, 236).

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[19]Section 213(a)(1) by the Transportation Act of 1940 was incorporated within Section 5(b).

The report continued:

"It remains to be determined whether, in accordance with the definition of 'public convenience and necessity' in the *Pan-American case, supra,* 'it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.'" (p. 236).

* * * * * * *

"The coordinated service which the railway contemplates establishing with applicant would embrace the *entire system of the railway, and each and every one of its stations.*" (p. 236).

"As has been indicated, protestants contend that if applicant be given the certificate which it seeks, they will suffer severely from the new competitive service which it will offer, not only in conjuntion with the railway but on its own account. Competition is already so keen in the territory concerned that protestants can ill afford any further diversion of business. They particularly fear the competition of a motor carrier which, like applicant, would not be wholly dependent upon its own resources but would have the financial support of a parent rail company and, in addition, the benefit of the traffic-soliciting force and prestige of the latter and the use of many of its facilities. They go so far, indeed, as to assert that existence of independent motor carriers cannot in the long run be maintained, if railroads are to be allowed to go freely into the motor-carrier business, and they express the belief that the inherent advantages of motor-carrier transportation cannot be preserved under such conditions. Interpreting their views, the thought seems to be that railroad-controlled motor carriers mught ultimately be able to prevail over independent competitors, not because of any superiority in service or operations, but through their ability to draw upon the financial and other resources of their parent companies, and that the motor-carrier industry is more likely to develop in inherent strength and efficiency if it continues, as in the past, to remain largely in independent hands.

In *Pennsylvania Truck Lines, Inc.—Control—Barker M. Frt.*, 1 M. C. C. 101, 111, we expressed a somewhat similar thought as follows:

"* * * we are not convinced that the way to maintain for the future healthful competition between rail and truck service is to give the railroads free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations. The language of section 213, above quoted, is evidence that Congress was not convinced that this should be done. Truck service would not, in our judgment, have developed to the extraordinary extent to which it has developed if it had been under railroad control. Improvement in the particular service now furnished by the partnership might flow from control by the railroad, but the question involved is broader than that and concerns the future of truck service generally. The financial and soliciting resources of the railroads could easily be so used in this field that the development of independent service would be greatly hampered and restricted, and with ultimate disadvantage to the public.

"Protestants now meet with the competition of the railway but, in the case of the merchandise traffic handled in less-than-carload lots, that competition has not been particularly formidable. The railway now proposes to improve the handling of that traffic by establishing a coordinated truck-rail service in connection with applicant. As we have seen, the conclusion is warranted that there is a public need for this coordinated service, that it is *a new and different character of service* which neither the railroads nor the trucks alone can supply, and that it cannot be furnished effectively and well except through the use of applicant's facilities. We do not believe that the development of this new form of service will *seriously endanger* the operations of protestants, but, *in any event*, the public ought not to be deprived of the benefit of an improved service merely because it may divert some traffic from other carriers." (pp. 237, 238)

Having recognized that what the railroad proposes to do constitutes a "*new type of service*" and having found that there was a need for some part of this new service, the Division then undertakes to point out wherein the railroad failed to show public convenience and necessity and wherein it was necessary to safeguard independent motor carriers from railroad domination.

> "However, while it has been shown the public convenience and necessity require the establishment of a service by applicant which will be coordinated with that of the railway, the record is devoid of proof that there is any need for the institution of service by applicant which is not required in such coordinated operations. In other words, there are *plenty* of motor carriers in this territory and it has not been shown that there is *any need whatever* for another motor carrier to furnish service such as the existing carriers furnish and having no close relation to rail operations. It follows that the certificate to be granted to applicant should be limited accordingly.
>
> "We now come to the question of what restrictions shall be imposed in the authority to be granted so as to limit applicant's operations to those auxiliary to, or supplemental of, rail service and to prevent it from engaging in operations which will duplicate and compete with service now adequately provided by carriers by motor vehicle. * * * However, if existing operations of carriers by motor vehicle between such stations are to be protected, some limitation of the service to be rendered by applicant between these stations must be imposed. To accomplish this purpose, applicant has suggested that its hauls by motor vehicle might be limited to distances not exceeding 250 miles. It has also occurred to us that we might impose a limitation that applicant shall not transport any shipment over the entire distance between any two key points (terminals and breakbulk points) on the lines of the two rail carriers. Either of these limitations would leave applicant free to transport shipments wholly by truck from origin to destination over considerable distances, and therefore would protect only

the longer hauls of existing carriers by motor vehicle. The shorthaul traffic handled by such carriers, particularly from Kansas City and the other important manufacturing and jobbing centers on applicant's routes, constitutes a substantial portion of their business and would be unprotected. *We are of the opinion that neither of these limitations would be adequate.*

"Applicant's evidence, as well as that of the shippers who appeared, as to the need for improved service between the stations on the lines of the two rail carriers, relates almost entirely to the movement of shipments partly by rail and partly by motor vehicle. With the possible exception of some small stations, it is clear that the present facilities for the movement of freight wholly by motor vehicle between stations on the two rail carriers' lines are *adequate.* Consequently, we are of the opinion that applicant should be limited to the transportation of shipments which it receives from or delivers to either one of the two rail carriers under a through bill of lading covering, in addition to movement by applicant, a prior or subsequent movement by rail." (p. 239).

The Division then made certain findings and imposed certain conditions, among them being condition No. 3 as follows:

"3. Shipments transported by applicant shall be limited to those which it receives from or delivers to either one of the railways under a through bill of lading covering, in addition to movement by applicant, a prior or subsequent movement by rail." (All emphasis supplied).

Summary of the First Kansas City Case—10 M. C. C. 221.

To begin with, this was a decision by Division 5, composed of three commissioners. The decision was apparently written by Commissioner Lee. Commissioner Eastman filed a separate concurring opinion and Commissioner Rogers dissented.

The first legal point involved in the decision is that the Division concluded that it had legal authority to recognize and authorize a "*new type of service*" which differed from both rail service and motor carrier service. These appellants contend that there is no authority in law for such a conclusion.

Next, the Division found that the territory was *adequately* served by existing independent motor carriers, but nevertheless the Division concluded that the public should not be deprived of this *new service* even if it did take traffic away from existing motor carriers. That raised the second legal point. These appellants contend, that upon a finding by the Commission, that the territory was adequately served by existing motor carriers, the Division then and there *exhausted its jurisdiction* and could not issue a new carrier a certificate of convenience and necessity.

The attempts on the part of the Division to recognize the existence of or need for a new type of service was beyond its powers and was a matter for Congress alone to consider. The sincere efforts of the Division to safeguard the interests of independent motor carriers, by restrictions and conditions, was in legal contemplation an idle gesture and a nullity and *became a factual nullity when the full Commission removed the conditions.*

Immediately following this decision, the full Commission reconsidered the matter and without hearing any evidence, proceeded to eliminate the restrictions and conditions which Division 5 had imposed to protect independent carriers. The decision by the full Commission, on reconsideration, is set forth in full in plaintiff's bill of complaint, as Exhibit M.[20] We will discuss that decision and others later on. But before doing so, we will take up certain decisions by this Court, as they will serve to il-

[20] R. 109.

lustrate the errors of both the Division and the Commission.

Supreme Court Decisions on Convenience and Necessity

We have already suggested that the Division in undertaking to certificate a hybrid operation, part rail and part motor, exceeded its statutory jurisdiction, and we further pointed out that it disregarded its finding, that the territory was *adequately* served by independent carriers, and proceeded to certificate the hybrid operation on the basis of *railroad convenience.*

The Commission did not find that the independent carriers would *not* be hurt but merely said that it did *not believe* they would be hurt, and then went on to say that *in any event* the hybrid operations should be authorized.

Through a number of succeeding decisions the Commission has reversed and modified the early reports of Division 5; has clarified its position and *crystallized a policy to issue to every railroad applicant motor carrier rights upon the mere asking and without any regard for the effect on or injury to independent motor carriers.*

In order to fully appreciate the extent to which the Commission has gone beyond legal bounds and has acted arbitrarily and capriciously, reference is made to some of the decision by this Court on the question of public convenience and necessity and the significance of those provisions as they appear in the Interstate Commerce Act.

With respect to railroads, the Commission was first given jurisdiction over the extension and abandonment of lines and issues involving public convenience and necessity by the Transportation Act of 1920.[21]

The Commission acquired similar jurisdiction over motor carriers by the Motor Carrier Act of 1935.[22]

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[21] 41 Stat. 477; 49 U. S. C. A. 1 (18)-(22).

[22] 49 Stat. 551; 49 U. S. C. A. (306)-(308).

In an action by one railroad to prevent another from constructing a line for which no certificate had been secured, *Texas and New Orleans R. Co.* v. *Northside Belt R. Co.*,[23] this Court said:

> "The purpose of paragraphs 18 to 22 is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the public interest." (Citing cases).

The showing of public convenience and necessity is required not only for the purpose of extending lines in order to render additional public service, but serves the purpose of preventing the extension of lines and the impairment of the ability of existing lines to continue to render adequate public service.[24]

A clear statement of the issues at bar was made by this Court in another case in which a railroad sought to prevent a competitor from extending its lines *Texas and P. R. C.* v. *Gulf C. and F. R. C.*[25]

> "A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern, that the property employed must be permitted to earn a reasonable re-

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[23] *Texas and New Orleans R. Co.* v. *Northside Belt Railway Co.*, 276 U. S. 475, 72 L. ed. 661. Decided April 9, 1928.

[24] *R. Com. of Calif*, v. *So. Pac. Co.*, 264 U. S. 331, 68 L. ed. 713.

[25] *Texas & P. R. Co.* v. *Gulf & C. & S. F. R. Co.*, 270 U. S. 266, 70 L. ed. 578.

turn; that the building of unncessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. (Citing cases). The act sought among other things, to avert such losses."

* * *

"But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest."

The Commission should not administer the law with single-mindedness. The Supreme Court has required it to take into consideration the interests of both interstate and intrastate commerce.[26] Plaintiffs contend that the Commision cannot administer the certificate provisions, where railroad interests and truck interests are both involved, without considering the interests of both.

Eastern-Central M. C. Assn. v. *U. S.*, ... U. S. ....., 88 L. ed. 431.

In another case involving the federal policy, *Texas* v. U. S.[27] and concerning the removal of railroad shops, this Court said:

"It is a primary aim of that policy to secure the avoidance of waste. That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public."

[26] *Colorado* v. *United States*, 271 U. S. 153, 70 L. ed. 878. Decided May, 3, 1926.

[27] *Texas* v. *United States*, 292 U. S. 522, 78 L. ed. 1402.

Plaintiffs here contend that the Commission has approached the subject with a single-mindedness which has caused it to view only the matter of railroad convenience and economics and to disregard service and economics of competing transportation agencies. This is illustrated by the Commissions refusal to even permit protestants to introduce evidence to show that they would be hurt. We will deal with the refusal to hear evidence later in this brief.

It is clear from these decisions, that the Commission cannot through neglect disregard the interests of any competing transportation agency in applying legal criteria for determination of public convenience and necessity.

The national transportation policy is not a railroad transportation policy, but is a transportation policy applicable equally to all forms of transportation.

It may well be that the Commission having existed for 50 years in an atmosphere of railroad transportation is disposed to emphasize the importance of railroads. But Congress gave it no power to discriminate and the Commission is bound by the Interstate Commerce Act to accord equal consideration and equal treatment to all forms of transportation.

The Commission may cite *C & O Ry.* v. *U. S.*, 283 U. S. 35, 75 L. ed. 824, in support of the proposition that they have considerable administrative discretion in determining public convenience and necessity a view which we do not challenge. That case involved competing railroads. A certificate was issued which enabled one of the railroads to construct a short branch line which would eliminate bad grades and circuituous routes. On facts, the case is consistent with the position the Commission has taken in connection with motor carriers. In *Dixie-Ohio-Extension*, 17 M. C. C. 735, the Commission authorized a route through West Virginia to avoid the restrictive vehicle

size and weight laws of the State of Kentucky. Those situations were local and had nothing to do with national policy. We cannot imagine this Court approving a certificate because a railroad refused to make joint rates or otherwise refuse to cooperate with other railroads.

Summary of Supreme Court Decisions

Basically, provisions authorizing certificates of convenience and necessity are not merely grants of authority to conduct operations but are restrictions and limitations on the right to operate. Without the provisions of law restricting operations, everyone would be free to engage in all kinds of operations and without regard for public need or injury to established transportation facilities. Viewed in this light, the restrictions surrounding the issuance of certificates of convenience and necessity were as this Court said, clearly designed to accomplish the following purposes;

1. To avoid the waste involved in unnecessary duplication of facilities.

2. To protect the public interest against the necessity for supporting excess transportation facilities.

3. To prevent destructive competitive practices which affect the public interest.

Applying these principles to the present case, we have the proposition that all of the advantages which motor carrier service offers, is already being afforded the public by independent motor carriers. The fact that the railroad may save some money and make faster deliveries, if they use motor service, is sufficient reason why the railroad should cooperate with the independent motor carriers; but it is no reason why the railroads should go into the motor carrier business and burden the public with unnecessary duplications of transportation facilities.

If rail service is expensive and wasteful, it is no cure for such waste, to create more waste through unnecessary duplication of facilities. The public interest in having railroads eliminate waste in the handling of merchandise traffic, cannot be so great that the public interest would be served by destroying the economic stability of the motor carrier industry, which will result from permitting the railroads to engage in both types of transportation.

The railroad case does not lie in their inability to handle merchandise traffic on an economical basis, but lies in their refusal to better their situation through cooperation with the independent motor carriers.

So it has become the policy of the Commission to permit the railroads to fashion a showing of public convenience which rests on nothing more substantial than their refusal to abide by the National Transportation Policy.

Further Development of the Commission's Theory that Railroads Are Entitled to Motor Carrier Certificates as a Matter of Right and Culminating in the Second Kansas City Southern Case, 28 M. C. C. 5.

In the second *Kansas City Southern* case, 28 M. C. C. 5, the full Commission consolidated a number of cases involving similar issues and reviewed and modified the decision of Division 5, in the first *Kansas City Southern* case, 10 M. C. C. 221.

The cases involved and consolidated included the applications of the Seaboard Air Line Railway Company, intervenor here.

The decision by the full Commision in the second *Kansas City Southern* case is set forth in the complaint as Exhibit M.[28]

Between the first and second *Kansas City Southern* cases, decided November 12, 1938 and January 24, 1941,

[28] R. 109.

respectively, the Commission gradually clarified its ideas and simplified its language. On July 11, 1939, Division 5 reversed the Joint Boards and granted the Seaboard Air Line Railway, intervenor here, all the rights which it had applied for. That decision is reported in 17 M. C. C. 413 and is set forth in full as Exhibit "L" of the complaint.[29]

The Division said:

> "While the evidence indicates that in most instances there is adequate motor-carrier service over the considered routes it is also clear that applicants' proposed service will expedite deliveries of less-than-carload shipments which now move by rail."
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> "There seems little question as to the proposed rail-truck coordinated service being in the public interest *nor does it appear from the records made in these cases* that there will be any great diversion of traffic from existing independent motor carriers. However, the only need shown of record is for service which is strictly supplemental of, or auxiliary to, and coordinated with applicants' rail service and the certificate granted herein will be limited accordingly. The limitations contained in the findings below are similar to those prescribed by us in the *Illinois Central* and *Kansas City Southern* cases, *supra*.
>
> "We find that the present and future public convenience and necessity require operation by applicants as a common carrier by motor vehicle, in interstate or foreign commerce, of general commodities between the points and over the regular routes described in the appendix hereto, serving the intermediate and off-route points referred to, and subject to the following conditions:
>
> "(1) The service by motor vehicle to be performed by applicants shall be limited to service which

[29] R. 81.

is auxiliary to or supplemental of the service of the Seaboard Air Line Railway;

"(2) Applicants shall not serve any point not a station on the rail lines of the Seaboard Air Line Railway;

"(3) Shipments transported by applicants by motor vehicle shall be limited to those which move under a through bill of lading covering, in addition to movement by motor vehicle, a prior or subsequent movement by rail.[30]

"(4) Such further specific conditions as we in the future may find it necessary to impose in order to restrict applicants' operations by motor vehicle to service which is auxiliary to or supplemental to the rail service of the Seaboard Air Line Railway."[31]

It will be noted that the Division found that generally there was adequate independent motor carrier service. The Division also found that the only service which applicants had shown a need for is that "which is strictly supplemental of, or auxiliary to, and coordinated with applicants' rail service".

The Division found that it does not "*appear from the records made in these cases that there will be any great diversion of traffic from existing independent motor carrier*".

The Court will please note that the Commission did not find on the record that there would be no diversion of traffic. The Commission found that there was *no evidence upon which a finding could be made.* That was the Commission's fault, and that is why these appellants are complaining because the Commission excluded the evidence.

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[30]This condition has been removed by the full Commission. 28 M. C. C. 5, R. 109.

[31]R. 81, 105.

The real position of the Commission was finally set out in simple language in *Pacific Motor Trucking Company* (a railroad subsidiary), 21 M. C. C. 761, decided February 16, 1940:

> *"The points in question are admittedly served by other motor carriers, and protestants on exceptions contend that public convenience and necessity therefore do not require the proposed operation. While adequate motor-carrier service, as such, is no doubt available, we have somewhat consistently refused to compel rail carriers to make their coordinate efforts dependent on competing motor carriers.* • • • We have in several instances granted similar authority to other carriers. Illinois Central R. Co., 12 M. C. C. 485, Kansas City S. Transport Co., 10 M. C. C. 221, Seaboard A. L. Ry. Co., 17 M. C. C. 413" (763-4) (Italics ours).

Will the Court please note the Commission's frank admissions that *"adequate motor carrier service, as such, is no doubt available."*

In many other cases the Commission contented itself by merely reciting that the protestants claim that they could furnish the service and then concludes:

> "Substantially similar contentions were advanced by certain protestants in Kansas City Southern case, supra, and our views with respect thereto are amply set forth therein." *Mo. Pac. R. Co.*, 22 M. C. C. 321, decided March 23, 1940.

The Commission made no effort to dispose of the claim that the protestants could furnish the service.

We have now reached the point where it is crystal clear that the adequacy of existing motor carrier service is not given any consideration whatever by the Commission in issuing additional motor carrier certificates to railroads.

We come to the case of *Indiana R. Co. Extension—Fort Wayne via Muncie*, 27 M. C. C. 176 (decided December 23,

1940). Here we find some appreciation, of where the Commissions policy was leading. Commissioner Patterson, dissenting:

> "Numerous common-carrier motor-truck lines operate in direct competition with applicant's railroad. It is because of this competition and a preference of the shipping and traveling public for motor transportation that traffic of the railroad has been reduced to a point where the cost of operations exceeds the revenues. For this reason division 4 in Indiana R. Receiver Abandonment, 240 I. C. C. 359, permitted abandonment of applicant's railroad lines.
>
> "Here the majority of division 5 proposes to find that public convenience and necessity require the operation by applicant as a common carrier by motor vehicle over the same routes as traversed by the rail lines and over an additional route. *The fact that applicant did and does operate a railroad is not proof that public convenience and necessity require operation by it as a motor carrier. The law requires the same evidence of convenience and necessity from this applicant as from any other.* The facts negative such a showing. The existing truck lines must have adequately handled the traffic which the report of division 4 finds was diverted from applicant's railroad to them because of the public's preference. This being so, why is another truck line now required? *Its establishment can only result, if it is to be successfully operated in a diversion of traffic from existing truck lines.*" (179) (Italics ours).

We have now reached the point where the Commission issues motor carrier certificates to railroads as a matter of right under any circumstances and without restrictions or limitations of any kind. They do so without regard for the adequacy of existing motor carrier service, not only when the railroad wishes to parallel its lines with motor carrier operations, but extend the privilege to points and routes where the railroad does not even exist because of abandonment and of course there could be no railroad service to improve.

In the first *Kansas City Southern* case, 10 M. C. C. 221, Division 5, imposed Condition No. 3, hereinbefore referred to, restricting railroads to use the motor carrier service for traffic having a prior or subsequent movement by rail.

The railroads were dissatisfied with that restriction and applied to the Commission to have it removed. Without any evidence and without even a hearing, the full Commision reconsidered the order of Division 5 and eliminated the restriction calling for a prior or subsequent movement by rail. That was done in the second *Kansas City Southern* case, 28 M. C. C. 5, decided January 24, 1941. Many railroads had protested against having any restrictions put in their certificates and the Commission consolidated the cases and included the applications of the Seaboard Air Line Railway, intervener here. At one fell swoop the Commission removed the restriction calling for a prior or subsequent movement by rail for all railroads.

In the reopened *Kansas City Southern* ease the full Commission said:

> "As stated, the representatives of the latter urge that, if the railroads would cooperate with them, the desired coordinated service could be adequately provided by the use of existing facilities and without the grant of any new operating authority. This contention was sufficiently discussed by division 5 in the prior reports. As pointed out in the *leading* case, 10 M. C. C. 221, we are *without jurisdiction to compel coordinated service* by the carriers by rail and carriers by motor vehicle. It could only be accomplished through the medium of through routes and joint rates; we have no power to require their establishment, and accordingly any such plan of coordination must depend upon voluntary cooperation; * * *
>
> * * *
>
> "It must be borne in mind, as above indicated, that in all of these cases the railroad has been and is transporting the traffic in question between its stations and

> is under obligation to continue to do so. What it is seeking is not to enter a new field of service but to substitute a more efficient for a less efficient means of service. * * * One competitive carrier has no vested right in the continuation by another of an inefficient method of operation, and we believe it to be neither the policy of Congress nor the proper function of this Commission to retard any form of progress in transportation which will serve the public interest" (10).

But once more we find some members of the Commission unable to completely agree with the Commissions policy. Commissioner Lee, in objecting to the removal of the restriction, that when the restriction was removed the railroad owned operations would be in full and complete competition with existing motor carriers. Commissioner Lee pointed out that in the first report of the case the Commission had found:

> "that there are plenty of authorized motor carriers in operation throughout the territory in which the Kansas City Southern Transport Company proposes to operate; that, with the possible exception of some small stations, the present facilities for the movement of freight wholly by motor vehicle between the points which it proposes to serve are adequate; that the record fails to establish that there is any need whatever for it to provide a service such as the existing motor carriers are furnishing; and that public convenience and necessity require only the establishment by it of a motor-carrier service which will be auxiliary to, or supplemental of, rail service of its parent railroad company and which will not *duplicate motor carrier service now adequately provided by existing motor carriers.*" (23).

Commissioner Lee argued that, in its first decision, the Commission had justified its grant of authority by claiming that the operations *would not be competitive with motor carriers because of the nature of the restrictions attached.* He recognized that it was necessary to find that

existing service was not adequate, before a rail applicant could be granted a certificate. The Commissioner said:

> "The result is that they are granted authority to engage in motor carrier operations and to furnish motor carrier service which are not coordinated with or in any wise *tied into operations or rail service but* which, on the contrary, *will duplicate the operations* and the service provided by existing motor carriers and found to be adequate to fill the public need" (24). (Italics ours.)

Commissioner Lee used the most expressive language we have found in any of the cases:

> *"The act does not authorize us to grant a certificate or permit, authorizing motor-carrier operations by a railroad or its subsidiary, on any less proof of public need therefor than is required of other applicants for such operating authority.* It may be, as stated in the report, that 'one competitive carrier (a motor carrier) has no vested right in the continuation by another (a railroad) of an inefficient method of operations. *Neither does a* railroad or its subsidiary have a 'vested right' to inaugurate new motor carrier operations in competition with existing authorized motor carriers without establishing public convenience and necessity therefor." (p. 24.) (Italics ours.)

Nevertheless the condition requiring a prior or subsequent movement by rail was removed by the full Commission.

Apparently the Commission felt that it had gone pretty far therefore, without a scintilla of evidence or any hearing whatever, it adopted a new restriction called "key points". By key points the railroad could haul traffic that never touched the railroad but it could not haul that traffic through more than one key point.

The Commission had no evidence upon which key points could be selected.

The next step was to get rid of the key point restrictions and that has already been substantially accomplished.

In the case of *Atlantic Coast Line Railroad Company Extension of Operations—Virginia-North Carolina*, 30 M. C. C. 490, decided September 12, 1941, the Commission said:

> "We are also of the opinion that public convenience and necessity require the proposed service. What applicant is seeking is not to enter a new field of service but to substitute a more economical and flexible service. Applicant has been and is transporting the traffic in question by rail, and it is under obligation to continue to do so. The proposed coordinated rail-truck service will result in a saving and a more efficient handling of merchandise traffic as well as in an improvement in the handling of carload traffic. *Protestants assert that Thurston Motor Lines serve all of the points involved, and it may be, as contended, that existing moto carrier service is adequate, but one competitive carrier or class of carriers has no vested right in the continuation by another of an inefficient method of operation. Rather, we believe it to be the policy of Congress and the proper function of this Commission to foster any form of progress in transportation which will serve the public interest.*" (p. 492.) (Italics ours.)

We paraphrase the Commission's observation and say: "*that no railroad or class of railroad has a vested right to engage in the water carrier, motor carrier, or air carrier business simply because a railroad is an inefficient method of transportation for certain traffic under certain conditions.*"

In a still later case the Commission reversed another denial order of a Joint Board. The Commission, in doing so, said:

> "While the Joint Board recommended that the application be denied, it did so not because it believed

the proposed coordinated service would not serve the public interest, but because it believed such service should be rendered through the coordination of the rail service with the service of existing independent motor carriers." *C. & N. W. Ry.*, 31 M. C. C. 457, decided December 16, 1941.

The Commission went on to say that this made the case turn on the question of whether the grant to the applicant would adversely affect the operations of existing carriers. The Commission said:

> "Contrary to protestant's contention, *we are of the opinion* that the proposed service will not adversely affect the operations of existing motor carriers. Applicant merely proposes to improve an existing service through the utilization of motor vehicles in rendering a service which will be auxiliary to, supplemental of, and coordinated with the rail service. Applicant does not propose to invade territory of any other carrier. All of the points are stations on the rail line which applicant has served for years and is under obligation to continue to serve. Applicant merely proposes to improve that service in an endeavor to retain existing patrons through offering them a service more in keeping with their requirements under existing merchandising methods. *To say that such service will adversely affect the operations of existing motor carriers is to admit the superiority of the proposed service which protestants strongly deny. It may be, as protestants contend, that costs of solicitation invariably will rise and that motor carriers temporarily lose some business with the advent of a new competitor, even though its service is not superior, but, as before stated, applicant is not and will not be a new competitor. On the other hand, one competitive carrier or class of carriers has no vested right in the continuation by another of an inefficient method of operation.*" (p. 457-8). (Italics ours.)

Here again the Commission substitutes conclusions for findings and states "*we are of the opinion that the pro-*

posed service will not adversely affect the operations of existing motor carriers". That statement or its equivalent was contained in the reports in the *Seaboard* cases here under attack. In our case the Commission refused to hear evidence, refused to permit protestants to develop what the railroads proposed to do and the extent of injury to independent motor carriers. We will develop the refusal to hear evidence later, but in the meantime, the Commission's "belief" should not be taken seriously. The Commission could not possibly arrive at a legal conclusion when it refused to receive evidence and make findings.

The exclusion of relevant evidence is contrary to a legal hearing and the Commission has not complied with the statuory requirements that it find that the "operations will not unduly restrain competition".

The Commission has merely been saying elaborately, something which could have been said quite simply. All these cases mean, is that if a railroad refuses to deal with independent motor carriers, it is entitled to a certificate and, *there is no conceivable set* of facts that could persuade the Commission that the certificates should be denied.

These cases establish one point that cannot be disputed. They have not been decided on the basis of the evidence presented in each case, but rather on a firmly fixed *policy* that *independent motor carrier service will not be coordinated with rail service, by the Commission, the Transportation Policy notwithstanding.* The tell-tale sentence that explains every one of these decisions is that cited from *Pacific Trucking Company,* supra:

> "While adequate motor carrier service as such is no doubt available, we have somewhat consistently refused to compel rail carriers to make their coordinating efforts depend on competing motor carriers."

The Commissions observations about having no authority to compel the railroad to use existing service; that the motor carriers should not stand in the way of the railroad in trying to improve its service and that the railroad will receive benefits and the assumption that those benefits might filter down to the public are without legal significance. *The Commission still has the duty of deciding as a matter of law, whether the existing service could meet the claimed public need.* The Commission can coordinate transportation services by the simple method of denying certificates to carriers which refuse to coordinate services.

A variation of the general rule applied in these railroad cases comes to light in a case involving another railroad subsidiary—the Railway Express Agency. In one of its many hundred applications before the Commission, it was denied the right to extend its trucking facilities in a case decided in January, 1942. *Railway Express Agency Extension,* 31 M. C. C. 606. The Express Company wanted to add a motor carrier operation in addition to its use of a railroad between certain points in Misissippi. A number of independent motor carriers appeared in opposition. They indicated their willingness to enter into the necessary arrangements. The Commission said:

> "The determination of this question should be based on the same principles as govern the applications of independent motor carriers, that is, if adequate service exists, the applications should be denied." *Railway Express Agency, Inc. Extension—Durant-Kosciusko,* 31 M. C. C. 606, decided January 6, 1942.

The Commission, in deciding the case without reference to the protestants' service said:

> "While protestants may furnish adequate motor vehicle service, their service is confined to the transportation of freight rather than express. Nevertheless, *it is beside the point,* whether protestants could adapt their service to the transportation of express

so as to meet applicant's requirements. The point is whether applicant has made the showing of public convenience and necessity required by the Interstate Commerce Act. It is well settled that the words 'convenience' and 'necessity' are used conjunctively, and are not synonymous, but must be given a separate and distinct meaning. *Atlanta & St. A. B. Ry. Co. Application*, 71 I. C. C. 784" (p. 606). (Italics ours.)

"Here, the motor-vehicle operations proposed by applicant are designed to supplement the existing train service from and to the specified points merely for purposes of operating convenience. There is no evidence that the existing train service is incapable of adequately supplying the express transportation needed at these points. While the proposed motor vehicle operations would no doubt be a 'convenience', they have not been shown to be a 'necessity'. Bearing in mind the close affiliation between applicant and the railroad, we are of the opinion that substantial proof of 'necessity' is required in instances where, as here, motor-vehicle operations are proposed to supplement rather than to replace rail operations" (p. 606).

The important point to note is that here the Commission was unwilling to give any weight to existing motor carrier service. But at the same time it gave full weight to the rail service.

Misuse of "Public Interest" Theory

The Commission is authorized to issue certificate of convenience and necessity to common carriers upon a finding:

"that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity."[32]

The Commission is authorized to issue permits to contract carriers which do not serve the public, upon a finding:

[32] Section 207(a).

> "that the permit will be consistent with the public interest."[33]

The term "consistent with the public interest" is also found in Section 5 (old Section 213), dealing with mergers, of carriers which already hold certificates, and in Section 211, dealing with the issuance of licenses to brokers.

The Commission has issued motor carrier certificates of convenience and necessity to railroads under circumstances far short of those required to establish public convenience and necessity, and has explained its action by finding that the issuance of such certificates would be "consistent with the public interest".

Consistency with the public interest has been expressed by the Commission as follows:

> "There is no question that the proposed rail-truck coordinated service is in the public interest."[34]

In cases involving independent motor carriers the Commission has recognized the distinction between "public convenience and necessity" and "consistent with the public interest." To the contention:

> "that 'public interest is in contemplation of the Act synonymous with public convenience and necessity;' the Commission said: * * * *In our view these contentions are 'unsound.'* (Italics ours). *James A. Sproul Contract Application*, 1 M. C. C. 467.

In *St. Andrews Bay Transportation Co., Extension of Operations*, 3 M. C. C. 711, the Commission pointed out

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[33] Section 209(b).

[34] *Pacific Motor Trucking Company*, 21 M. C. C. 761;
Texas and Pacific Motor Transport Co., 30 M. C. C. 467;
Atlantic Coast Line Railroad Company Extension of Operations, 30 M. C. C. 492;
C. & N. W. Railway Company Extension of Operations, 31 M. C. C. 457;
Texas and Pacific Motor Transport Co., Extension of Operations, 33 M. C. C. 38.

that there is a vital difference between the finance (section 5) requirement and the test prescribed in the public convenience and necessity section. The Commission said that the test in the finance section had to do with the "public interest", while Section 207(a) prohibited the issuance of a certificate unless it is found that "the proposed service is or will be required by the present of future public convenience and necessity."

The Commission has, therefore, definitely recognized the difference in the tests, yet, *in all of these railroad cases*, it has considered the test of "public interest" to be the governing one and thereupon issued certificates of convenience and necessity.

Legislative History of "Convenience and Necessity"

There are sufficient references to convenience and necessity to give a clear indication of two points. First, that convenience and necessity, as used by Congress, was intended to have the same meaning as when heretofore used in state legislation and as the state acts have been construed by the Courts. And second, that convenience and necessity was prescribed with the view of putting restrictions on excess transportation facilities. Nowhere in the legislation is there any indication that certificates of convenience and necessity were to be issued in order to enable any type of transportation to merely improve its service by engaging in all other types of transportation.

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Mr. Wheeler:

"These sections require each common carrier of passengers or property to secure a certificate of public convenience and necessity. Such certificates are to be issued on a finding by the Commission that—

"The applicant is fit, willing, and able properly to perform the service proposed and to conform to the

provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity.

"This is a provision which is in practically every State law at the present time. There was some objection to it, and a suggestion was made that we should not use the word 'future' in connection with 'public convenience and necessity', and that we should not use the words 'public convenience and necessity.' But those words have been adopted by almost every State in the Union where there is a law, they have been interpreted by the courts, and the committee felt that while perhaps some other language might have been just as appropriate, nevertheless, that language having been construed by the courts, it would be unwise for the committee to write some other language in the law which would have to be passed upon by the courts." (C. R. 5880).

Mr. Harlan:

"About 15 years ago it was discovered with regard to the question of transportation that there must be some limitation placed upon the amount. So the States devised the system of certificates of necessity and convenience. It is not a new proposition by any means. It has been found by the States that requiring certificates of necessity and convenience is a very essential thing to supply in service in public transportation. We have an example here in the District of Columbia of the evil of not having that kind of control by the public, in our taxicab situation, where all the drivers are practically starving, where they do not have the facilities to keep their cabs in repair or keep them clean, and where, when we have a big convention, such as the Shrine convention, they go on strike to make up the losses that have been sustained in the past. We cannot give proper public service without some kind of control. We have had the railroads under control, and to a certain extent we have had the ships under control, but we have not made any Federal effort to control busses. The States

have all done it, but the Federal Government has done nothing, and there is no coordinated system." (C. R. 12679).

"Mr. Pierce, Yes; we did. A certificate of public necessity and convenience is simply to create a monopoly; it just means a monopoly for the fellows that hold those certificates, valuable though they are.

"Mr. Zioncheck. And the only way in which another person can come in and compete with one who has such a certificate is to come to Washington and make a showing that the person who has the certificate is not properly serving the public there, which is impossible.

"Mr. Pierce. Absolutely impossible." (C. R. 12695).

Mr. Merritt:

"But all students of the question, including the Federal Coordinator, who has been working on the matter for 2 years, are agreed that there must be coordination among these various transportation agencies, so as to produce not only the best and cheapest methods for the use of the public but also to provide for competition and rates to the end that transportation agencies may have a fair return on their investment and the users of the transportation may have low and equal rates, so that no territory and no person shall have an advantage in transportation rates over his neighbor or over neighboring territory." (C. R. 12686).

"Mr. Zioncheck. I have observed in all the argument here that you talk about the bananas upon the bunch and not about the tarantula that is hid in the bunch, which is the certificate of public convenience and necessity.

"Mr. Crawford. All right, let me answer that question. The question comes up about railroad acquisition. You put the contract common carriers in this country who operate trucks on a profitable basis by eliminating the brokers' loot and the rebate loot and I would like to see a railroad acquire those trans-

portation lines. They will be on a decent, living standard and you cannot buy them out. The way it is at the present time they are freezing them out gradually and to my certain knowledge the railroads are acquiring control of a lot of truck operators.

"Mr. Zioncheck. The gentleman has not answered my question. If there is an operator who obtains a certificate of public convenience and necessity, no matter what rates they charge, in order for anyone else to come in, they must come all the way to Washington, D. C., and make a showing before the Commission here that the public is not being adequately served or is being served at an exorbitant freight rate." (C. R. 12701).

Mr. Sadowski:

"Sections 207 and 208 relate to the issuance of certificates for common carriers, the terms and conditions, and provides that common carriers not in operation prior to June 1, 1935 must present proof of public convenience and necessity, responsibility, and so forth.

"This grandfather clause is absolutely necessary to prevent unscrupulous speculation and to protect pioneers of the industry for the public interest.

"Further, the convenience and necessity provision as it relates to common carriers only, is necessary to have a conformity with the already existing State laws, and the laws under which all common carriers are regulated, including railroads, pipe line, and so forth. We are convinced there can be no stability or progress of common carriers on the highways without the requirements of public convenience and necessity." (C. R. 12685).

Testimony of Mr. Eastman

Mr. Joseph B. Eastman, member of the Interstate Commerce and Coordinator of Transportation, appeared and testified before the Senate Committee holding hearings on S. 1629. His testimony as of February 26, 1935 on the question of convenience and necessity was as follows:

"The most important thing, I think, is the prevention of an oversupply of transportation; in other words, an oversupply which will sap and weaken the transportation system rather than strengthen it. In the case of railroads that was done in 1920 by the provision that prior to any new construction a certificate of convenience and necessity must be secured from the Commission. In my judgment it would have been much better if there had been such a provision many years before. It would have prevented certain railroad construction which tends to weaken the railroad system and situation at the present time. The States have, I think, in all cases, found the necessity in their regulation of motor transportation to provide for that prevention of an oversupply. It is a provision which has been adopted in most of the foreign countries that I have inquired into; in other words, the granting of certificates or permits in order to prevent an oversupply which weakens the situation.

"The Chairman. Of course in some of the States they have, it seems to me, abused that provision by preventing truck lines or bus lines where they come in competition with railroads. It seems to me that that is a bad thing in many cases—the prevention of competition with railroads." (p. 78).

Point 3.—Hybrid Operations.—The Commission Is Without Jurisdiction and Power To Certificate Hybrid Operations, Part Railroad and Part Motor Carrier and To Exempt Such Operations From the Tariff and Accounting Provisions of the Motor Carrier Act.

Hybrid Certificates

We have quoted enough of the law and of the legislative history thereof to make it clear that Congress recognized the motor carrier industry as a separate means of transportation.

Up to the time of the passage of the Motor Carrier Act in 1935, most of the use by railroads of motor vehicles, had to do with pick-up and delivery service in terminal areas.

It was recognized that in cities, the direct door-to-door service rendered by trucks, was desired by shippers. Railroads had experimented with that kind of service. The Motor Carrier Act, as originally passed and defining common carriers, subject to the Act, was as follows:

> "Sec. 203(14) The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I."

The exception referred to, in the definition, necessitated a determination by the Commission of the transportation which was subject to Part I, that is the rail section, of the Interstate Commerce Act, prior to 1935.

In *Pick-Up and Delivery Service in Official Territory,* 218 I .C. C. 441, decided October 13, 1936, the Commission determined that pick-up and delivery service within terminal areas *only,* was subject to Part I and railroads did not require certificates of convenience and necessity for that type of service. The Commission said:

> "In making this exception Congress may be presumed to have legislated with knowledge of the court decision previously mentioned, holding that pick-up and delivery service is within the meaning of 'transportation' as defined in Section 1(3) of the Interstate Commerce Act, as well as with knowledge of our own administrative findings to the effect that, while railroad terminal service by motor truck was subject to regulation under the Interstate Commerce Act, the use of motor truck by railroads in line-haul service was not subject to that act." (p. 473).

The question was a close one and there were some dissenting opinions. In 1940 Congress amended the Act and provided:

> "Sec. 202. (c) Nothwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—
>
> "(1) to transportation by motor vehicle by a carrier by railroad, subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, *in the performance within terminal areas of transfer, collection, or delivery services;* but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as transportation or service subject to part IV when performed by such freight forwarder;"

By this legislation Congress designated and limited the trucking service which railroads were to engage in, as part of their railroad service and with respect to which they did not require certificates of convenience and necessity or tariffs under the Motor Carrier Act. Congress having so clearly indicated its intentions, in this regard, it follows that all other truck service, either owner or operated by railroads, falls under the Motor Carrier Act exclusively and fully. The Commission has no power or jurisdiction to create a hybrid operation outside of terminal areas. It has no jurisdiction to waive the requirements for proof of convenience and necessity nor the requirements of any other provisions of the Motor Carrier Act.

The Commission has certified the railroad to conduct motor carrier operations outside of the terminal areas,

in line-haul operations, without motor carrier tariffs, without proof of convenience and necessity, and without accounting reports and in effect has completely disregarded the Motor Carrier Act. The hybrid operations contemplated by the Act were prescribed by Sec. 202(c), and confined exclusively to terminal areas.

The Commission has no power to create a hybrid operation, part rail and part motor, outside of terminal areas.

With reference to intrastate commerce, the railroads have been very diligent in the state legislatures and in at least one instance, have succeeded in having the legislature direct the issuance of motor carrier certificates to railroads for over-the-road operations *without proof of public convenience and necessity.*

In Florida the procedure is as follows:

> "Provided, however, that upon the making of proper application therefor by any such railroad company, its receivers and/or trustees, or by any company other than a railroad company, the majority of whose stock is owned by any such railroad company, its receivers and/or trustees, *the Commission shall, as a matter of right and without a hearing, grant a certificate of public convenience and necessity to any such railroad company,* or to the receivers and/or trustees of such company, or to any such company other than a railroad company, the majority of whose stock is owned by any such railroad company, its receivers and/or trustees, to operate for the transportation of freight, express and/or United States mail over the highways and public roads of this State, using only the most practicable route located nearest to its rail lines and which is generally and/or used between the communities served by its rail lines, said route as herein defined to be determined by the Railroad Commission, motor vehicles between and within communities which are connected by and served by the rail lines of any such railroad company, but not elsewhere. The rates and charges for transportation by motor vehicles, as

in this section provided, shall be the same as those which any such railroad company, its receivers and/or trustees may be authorized to charge if such transportation had been solely by rail; * * *" (Section 27, Chapter 14764 Laws of Florida, Acts of 1931, as amended by Section 1 of Chapter 18027, Acts of 1937). (Italics supplied)

It will be seen that the State of Florida has a transportation policy for intrastate commerce which is radically different from that of Congress for interstate commerce. The Interstate Commerce Commission has undertaken to adopt the Florida policy in connection with intrastate commerce, for interstate commerce generally.

If and when motor carrier certificates are to be granted to railroads "as a matter of right and without hearing" as provided in the Florida Act, it is our point that such authority must come from Congress and that in the meantime it is the duty of the Commission to administer the law as they find it.

Monopoly—Anti-trust Laws

The only conceivable basis for any certificate to conduct motor carrier operations, and particularly hybrid operations, rests on the refusal of railroads to coordinate services with independent motor carriers.

The manner in which the Seaboard Air Line sought to establish a fictitious basis of public interest and necessity, by its refusal to cooperate with independent motor carriers is shown by the record.[35]

It has never been shown in any case that they could effect any economies or serve any public purpose by operating trucks themselves, which could not be accomplished by cooperating with independent motor carriers. This

[35] See appendix—Index to Testimony.

shows both a refusal on the part of the railroads to carry out the national transportation policy and also a determination to create a monoply in the transportation field.

These activities on the part of the railroads have received attention from the Anti-trust Division of the United States Department of Justice. On October 25, 1939 in a case entitled *United States* v. *the Association of American Railroads,* Civil Action No. 4551 in the District Court of the United States for the District of Columbia, injunction proceedings were brought against the railroad association and a large number of individual railroads, including Legh R. Powell, Jr., and Henry W. Anderson, Receivers, Seaboard Air Line Railway Company.

The complaint alleged a conspiracy, to defeat the coordination of transportation between railroads and independent motor carriers, in violation of the Sherman Act. The complaint recites the actions taken by defendants, including the receivers of the Seaboard to further the purposes of the conspiracy.

> "22. On September 20, 1935, in the City of Washington, in the District of Columbia, the defendant railroads, acting in concert with each other, through and with the aid and cooperation of the defendants, the Association of American Railroads, its officers and directors, adopted, promulgated, and issued and entered into the following resolution and agreement, pursuant to the Association's Plan of Organization:
>
> > "RESOLVED, That the Board of Directors announces the policy that no new rates should be published on loaded trucks, trailers, or truck bodies, nor should there be established any new 'all commodity' rates, or rates on containers, or rates on a per-car basis including compartment car rates, until further action by the Board. The President is directed to notify member roads accordingly.
>
> "23. In similar manner, the defendants hereto, on the same day, September 20, 1935, in the City of

Washington, in the District of Columbia, adopted, promulgated, and issued and entered into a further resolution and agreement pursuant to the Association's Plan of Organization, as follows:

"RESOLVED, That the President be directed to issue an order forbidding the establishment of joint rates as between member roads on the one hand and common carrier truck or bus companies on the other except in cases where, after consideration by the proper Traffic Executive Association where such an arrangement may be proposed or where in territory not subject to the jurisdiction of any traffic association then by the chief traffic executives of all lines interested, it is unanimously agreed that the territory involved is not served by railroad and such arrangement therefore would not constitute an invasion of another railroad's territory.

"The Board explains that the prohibition in the exception does not apply to arrangements made by a railroad between points on its own operated lines where such an arrangement is for convenience or economy, but does conclusively prohibit the invasion of a territory by another line which is already served by one or more railroads.

"The spirit of this resolution is interpreted and intended that no railroad company will issue through bills of lading with common or contract truck carriers, nor will any railroad company advance charges (except for operation in terminal districts) to either common or contract truck carriers, except, of course, where joint rates have been made under the conditions authorized in the above resolution.

"In accordance with the direction of such resolution and agreement, the defendant, John J. Pelley, President of the defendant Association, on September 27, 1935, issued an order directed to the Executives of all the defendant railroads, which was intended to and did carry out the mandate of said resolution and agreement.

"24. In similar manner, the defendants hereto, on June 25, 1937, in the City of Washington, in the District of Columbia, adopted, promulgated, and issued and entered into a further resolution and agreement pursuant to the Association's Plan of Organization, as follows:

"WHEREAS, On September 20, 1935, the Board adopted a resolution dealing with the invasion of territory of one railroad by another, through the medium of joint rates with motor carriers; and

"WHEREAS the said resolution and the interpretation thereof contained in the President's letter to Executives of Member Roads, bearing date of September 27, 1935, have been the subject of misunderstanding as to its true meaning and proper application; and

"WHEREAS it seems to be advisable that the policy intended to be announced in this resolution and interpretation should be clarified and redefined,

"THEREFORE BE IT RESOLVED, That the said resolution of September 20, 1935, and the same is hereby rescinded and in lieu thereof the following is adopted as an announcement of policy of the Association:

"It is hereby declared to be the policy of the Association that the public interest will be promoted and the integrity and credit of the Railroad Industry improved and maintained if the railroads refrain from establishing with motor carriers through routes or joint rates or fares which invade territory not served by such railroad and which is already served by one or more other railroads.

"It is further the policy of this Association that it is not desirable for the rail carriers to enter into joint billing arrangements with, or to advance charges to motor carriers, except where the services of such motor carriers are within a terminal district."

On July 18, 1941, there was entered a consent decree permanently enjoining the defendants, including the receivers of the Seaboard Air Line Railway. The decree is as follows:

"FINAL DECREE

"The United States of America filed its complaint herein on October 25, 1939. This Court has held that the rescission by the Board of Directors of defendant Association, as alleged in defendants' Motion for summary judgment and admitted by plaintiff, of the two resolutions of September 20, 1935, and the one of June 25, 1937, as set forth respectively in paragraphs 22, 23, and 24 of the complaint, did not and has not rendered this cause moot. Defendants have appeared and filed their joint Answer. The complaint has been amended as to the parties defendant by stipulation filed herein as of this day. Each of the defendants has consented to the entrance of this decree without the taking of any testimony and without findings of fact;

"And it appearing to the Court that this judgment will provide suitable relief concerning the matters alleged in the complaint herein; and it further appearing that by reason of the aforesaid consent of the parties, it is unnecessary to proceed with the trial of the cause or to take testimony therein or to make any adjudication of the facts;

"NOW THEREFORE, upon motion of complainant and upon the consent of all parties hereto and without taking any testimony or evidence, it is hereby

"ORDERED, ADJUDGED, AND DECREED:

"I. That this Court has jurisdiction of the subject matter as set forth in the complaint, and all parties hereto, with full power and authority to enter this decree.

"II. That the complaint states a cause of action against the defendants under the Act of Congress of July 2, 1890, entitled 'An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies,' commonly known as the Sherman Antitrust Act.

"III. That the defendants, and each of them, and each and all of their respective agents, representatives, employees, officers, directors and members, and all persons acting or claiming to act on behalf of the defendants, or any of them, are hereby perpetually enjoined and restrained from according any force or effect to the aforesaid resolutions of the Board of Directors of defendant Association, or to any agreement, concert, or understanding, existing by virtue of, growing out of, or in any way attributable to, said resolutions, and from soliciting, encouraging, or coercing by any manner or means any of the defendants, or the officers, directors, agents, servants, or employees thereof, to abide by such resolutions, agreements, concerts or understandings, or to accord them any force or effect.

"IV. That the defendants, and other parties described in paragraph III above, be perpetually enjoined and restrained from entering into any agreement, concert or understanding with the defendant Association, its officers, directors or its membership, the effect of which is to restrain, or tend to restrain, the freedom and independence of each of the defendant railroads in accordance with its own individual managerial discretion in the matter of the establishment of through routes, joint rates, joint billing arrangements, the advancing of charges, and other mutual practices, in connection with interchange of persons and property between such defendant railroads and motor carriers.

"V. For the purpose of securing compliance with this decree, and for no other purpose, duly authorized representatives of the Department of Justice shall, on the written request of the Attorney General, or an Assistant Attorney General, and on reasonable notice, be permitted (1) access, during the office hours of said defendants, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendants, relating to any of the matters enjoined by this decree, (2) subject to the reasonable convenience of said defendants, and without restraint or interference from them, to interview officers or employees of said defendants, in the presence of counsel, regarding any such matters; and said defendants, on such request, shall submit such reports in respect of any such matters; and said defendants, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcement of this decree; provided, however, that information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings in which the United States is a party or as otherwise required by law.

"VI. Jurisdiction of this cause is hereby retained for the purpose of enabling any of the parties to this decree to apply to the Court at any time (upon due and reasonable notice to the adverse party or parties) for such further orders and directions as may be necessary or appropriate for the construction of or the carrying out of this decree, for the modification thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

"Dated July 18, 1941.

BOLITHA J. LAWS,

United States District Judge.

"We hereby consent to the entry of the foregoing decree:

For the United States of America:

THURMAN ARNOLD,
Assistant Attorney General.
FRANK COLEMAN,
Special Assistant to the Attorney General.

For the defendants:

R. V. FLETCHER,
J. CARTER FORT,
J. M. SOUBY,
GREGORY S. PRINCE."

The action of the receivers of the Seaboard in refusing to cooperate with the independent motor carriers clearly falls within the scope of the foregoing injunction proceedings. It is clear that the Seaboard has by refusal to cooperate, undertaken to establish a false and fictitious showing of convenience and necessity.

But neither the injunction proceedings on the action of the Seaboard has impressed the Commission. The final consolidated hearing on the Seaboard applications was held November 12, 1941, as shown by Exhibit "O" of the appendix to the complaint[36] and the final consent decree had been entered on July 18, 1941.

We suggest that this Court can notice the disregard on the part of the Interstate Commerce Commission of developments in these matters.

Tariffs and Accounting

We charged in our bill of complaint, that the Commission had permitted railroads to file illegal tariffs. In

[36] R. 136.

answer the Commission challenged the jurisdiction of the Court to entertain the matter.

In our bill of complaint we charged that the Commission had exempted the railroads of accounting requirements. Again, in answer, the Commission challenged the jurisdiction of the Court.

There were a number of pretrial conferences which resulted in some clarification of these issues. Plaintiffs pointed out with respect to tariff and accounting matters, they did not seek direct relief from the Court but expected to show that the Commission's action, in connection with tariff and accounting matters, was but a part of the illegal policy that the Commission was following with respect to all matters concerning truck operations by railroads. Whereupon Stipulations No. 2 on tariff, and 3 on accounting, were entered into, which stipulations are printed in the appendix to this brief.[37]

By Stipulation No. 2, dealing with tariffs, it is shown that the Seaboard Air Line Railway does not publish a motor carrier tariff and it merely publishes a directory showing the points at which it renders motor carrier service under the railroad tariff. It is also shown that railroad tariffs are made applicable to shipments moving *entirely by truck* as well as by shipments moving partly by truck and partly by railroad. By the Congressional debates, Congress made it clear that the inherent advantages of truck transportation should be recognized and that truck transportation *should not be performed under railroad rates.*[38]

As set forth in Stipulation No. 2, the alleged authority for the publication of a tariff, substituting truck service for rail service at railroad rates, was based on the report

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[37] Appendix—Stipulations. R. 190, 191.

[38] Appendix—Legislative History.

of the Commission in *Ex Parte 129*, 232 I. C. C. 683, decided July 25, 1939. By reference to that document we find:

> "Pursuant to Sections 217 and 218, we have issued regulations governing the filing and publishing of rates in connection with motor carriers, including Section 2 of Tariff Circular 20 which deals with joint rates between motor carriers and common carriers subject to Part I and Rule 31 of that circular, which provides as follows:
>
> > "'Where it is desired to establish arrangements for through transportation with motor carriers, joint rates in accordance with the provisions of Section 216(c) of Part II of the Interstate Commerce Act and of the regulations applicable to both rail-motor rates as provided in Section 2 of this circular, as amended, should be established.'
>
> "We have realized, however, that in connection with the substituted service the rail carriers and other carriers cooperating with them must have a reasonable time to bring this service into conformity with these regulations * * *."
>
> * * *
>
> "In any event, it appears that respondents have done little more than seek and obtain, from time to time, extensions of the expiration date of the special permissions, the present expiration date being December 6, 1939. Accordingly on December 16, 1937, in order to bring the matter to a head, and in view of the novel and important questions presented as to the interpretation of Part II, we instituted the present investigation into the lawfulness of these rules and the practices of respondents in connection with this service." (pp. 684, 685).
>
> * * *
>
> "There can be no doubt that the interstate transportation service here under consideration is common-carrier service and that either the rail carrier must have authority to engage in common carriage by motor vehicle in its own right, or the motor carriers joining

in such service must be authorized to act as such carriers in their individual capacities. In either event, where the substituted service consists of a combination of line-haul movements by rail and motor it is in legal effect a joint service, no matter by what other name it may be designated." (pp. 687, 688).

In concluding its report, the Commission suggested a tariff rule by which railroads could to some extent, move shipments by motor vehicle on railroad tariffs. The suggested rule and the one which the Seaboard published is as follows:

"The less-than-carload rates shall apply for all-rail service and for joint rail-motor service to the following extent: The motor service will be performed only between points on the line of the origin or destination rail carrier and is limited to service by the motor carriers listed immediately under the name of such rail carrier between points so listed and to the most practicable highway routing nearest to the line of that railroad.

"Unless otherwise directed by the shipper, the less-than-carload shipments under the rate subject hereto will be transported in such all-rail or joint motor-rail service at the option of origin or destination carrier."

• • •

"The suggestions made herein contemplate that the substituted service shall consist of joint rail-motor or joint motor-water service, that is, a combination of line-haul movements by both motor and rail or water. Thus, they are not intended to cover instances where the service is entirely by motor carrier and no actual rail service is performed or instances where the port to port service is entirely by motor vehicle and no actual water service is performed. *Where all motor service is rendered from origin to destination or from port to port, all-motor tariffs published in accordance with Part II should be filed to cover.*" (pp. 689, 690).

• • •

"In our opinion: • • •

"(2) The substitution of one form of transportation for another at the carriers option, where the shipper otherwise directs, *would constitute a breach of the contract of carriage in contravention of Section 20(11)* of Part I and Section 219 of Part II."

The Commission's order says that the substituted service under the rule laid down in *Ex Parte 129*, only applies to movements partially by rail and partially by truck and cannot be applied to movements wholly by truck. But Stipulation No. 2 shows:

"It is further stipulated and agreed that said tariffs are applicable to the substitution of motor carrier service, for rail carrier service, for shipments receiving a prior or subsequent movement by rail as well as to shipments moving entirely by motor carrier service operated by said Receivers."

It has been made clear that these independent motor carriers are subjected to competition by motor carrier operations conducted by the railroads under railroad tariffs, with respect to shipments that never touch the railroad, and in flagrant disregard of the Commission's order in *Ex Parte 129*.

In *Ex Parte129* the Commission discussed at length the provisions of law, as laid down in Part II of the Interstate Commerce Act, but having its "policy" with respect to operation of motor carriers by railroads, it disregards the statutory requirements as to tariffs, the same as it disregarded the statutory requirements with respect to convenience and necessity.

The railroads never comlied with the order and on January 24, 1941, the Commission abolished its requirement for prior or subsequent movement by rail. 28 M. C. C. 5.

But that is not all. The Commission failed and refused to apply accounting requirements to railroad owned motor carriers such as are applied to independent motor carriers. As shown by Stipulation No. 3,[39] the Commission does not require the railroad to segregate its motor carrier revenues and expenses from its railroad revenues and expenses. The Commission has provided extensive accounting requirements for independent motor carriers in accordance with the provisions of Section 220.

In any number of Interstate Commerce Commission decisions dealing with motor carrier rates, the cost of performing the service has been made the test of reasonableness. Here, these independent motor carriers are confronted with competition on traffic moving 100% by railroad owned trucks and 100% under a railroad tariff without any separation whatever of costs. The railroads have simply been put in a position where they can cut rates and cut the throats of the independent motor carriers by absorbing and obscuring their motor carrier losses in their railroad accounts.

The Commission has failed and refused to require railroad accounting which is obviously necessary in order that the Commission may perform its statutory duties with respect to the determination of the reasonableness of rates charged by motor carrier operations conducted by railroads. *How can the Commission preserve the inherent advantage of motor carrier transportation when the operations, revenues and expenses of railroad owned motor carriers are scrambled with railroad accounts?*

The disclosure of these abuses will aid the Court in understanding that the Commission has misconceived its statutory duties. The Commission has failed to apply the law in dealing with motor carrier operations conducted by railroads.

[39] Appendix—Stipulations.
R. 191.

The occasion for issuance of certificates for hybrid operations can only arise by reason of the refusal of railroads to coordinate with independent motor carriers. Refusal to coordinate being contrary to the clear policy of the Motor Carrier Act, the Commission should have found that such refusal, in and of itself, was grounds for the denial of a certificate. As shown in our discussion under Point 2, the Commission undertakes to justify its waiver of normal proof of public convenience and necessity on the narrow ground that the operations authorized are different from either rail or motor carrier service and involves the elements of each. However, this position raises the question as to where the Commission finds jurisdiction to certificate a form of transportation which Congress has not recognized.

Point 4.—Exclusion of Evidence.—By The Exclusion of Evidence The Commission Failed to Conduct a Fair and Reasonable Hearing.

In no hearing did the Commission develop any evidence of its own upon which statutory findings might be based. By the time the *Seaboard* case, reached the full Commission it had reached that point in the development of its policy where it concluded that evidence was unnecessary. It not only refused to require the railroad to produce evidence but it also refused to permit independent motor carriers to develop evidence bearing on public convenience and necessity and destructive competitive practices. The Commission had evidently concluded that no matter how weak the railroad's showing might be or how strong a showing the independent motor carriers might make, such evidence could have no influence on the application of the Commission's policy. They have determined upon a policy to give railroads certificates for the asking. The law contemplates a hearing and proof.

As far as the Commission is concerned, all of the proceedings might just as well have been *ex parte* and disposed of by the mere filing of the applications by the railroads. The Commission took the numerous applications of the Seaboard Railway, covering some 1200 miles, and set them down for numerous separate and piece-meal hearings, thereby making it impossible for any protestant to show the extent of injury which it would suffer by reason of the consolidated operations.

The Commission's policy is in conflict with the statutory mandate that it must make findings in connection with certificates of public convenience and necessity and, further, where railroads are involved, it must find that the operations will not unduly restrain competition.

The complaint set forth in detail appellants efforts to secure a fair hearing and have the Commission develop and receive evidence. Every effort of plaintiffs to have the proceedings conducted as fair, reasonable and statutory hearing was rejected by the Commission.

Beginning with the hearings before the Joint Boards and concluding with numerous petitions and exceptions filed with the Commission, plaintiffs were denied a fair and reasonable hearing. In the appendix to our complaint we set forth numerous typical rulings of the Joint Boards with respect to evidence. These rulings were identified as Exhibit "B-3."[40]

On June 11, 12, 1937, Joint Board No. 2 considered the railroad's application for motor carrier rights between Hamlet and Columbia, which application was identified as MC-86687 Sub 3. Reference to Exhibit A-3,[41] will show that the application for rights between Hamlet and Columbia is a part of an unbroken series of rights extending all the

[40]R. 37 and 288-290, 313, 314, 464-466, 483-485.

[41]R. 34.

The line from Richmond to Columbia, as shown by Exhibit "A-3" is covered by separate applications numbered Subs 2, 3, 4 and 7. These applications were filed with the Commission on the same date, February 23, 1937, as shown by Exhibit "A-2"[42] to the complaint, and in the aggregate they cover something over 400 miles.

When Joint Board No. 2 heard the Sub 3 application, covering the segement between Hamlet and Columbia, protestants sought to show the relationship between the Sub 3 application and the connecting routes covered by other applications, including Subs 2, 4, 5 and 7. The chairman of the Joint Board ruled that both the Joint Board and the protestants would have to confine the evidence to the one single sub before the Joint Board, which was Sub 3. Nothing having any connection with or relation to any other pending application would be considered. The chairman of the Joint Board frankly admitted that he did not even know the other applications were pending, although the other applications joined the segment which the Joint Board was considering. For Joint Board statement, see complaint, appendix pages 15 and 16.[43]

Of course, plaintiffs could not deal effectively with the economic issues by confining themselves to a single segment. They were affected by the combination of segments, but they were not permitted to discuss the other segments or the effect of the combination, nor even to cross-examine the railroad witnesses with respect to the other segments.

The hearing on the segment covered by Sub 3 was held on June 11 and 12, 1937, before Joint Board No. 2, and the segment between Richmond, Virginia and Henderson, North Carolina (Sub 7) was heard on June 14, 1937, by an entirely different Joint Board. At all of the hearings,

[42] R. 32.

[43] R. 39 and 313.

protestants were prevented from discussing any of the connecting segments or the relationship of the connecting segments. The railroad applicant insisted that the hearing be restricted to each separate segment and the Joint Board so ruled and the Commission, on exceptions, ignored the protests. Protestants were denied an opportunity to show the Joint Board or the Commission, what effect these combined applications would have on the independent motor carriers, or what service the independent motor carriers could render, in coordinating their operations with the various applications of the railroad. See rulings shown at pages 16 to 19 of appendix to complaint.[44]

It was as unreasonable for the Commission to hear these applications piece-meal and thereby limit protestants' inquiry and evidence, as it would be to undertake to try an anti-trust case against the Standard Oil Company by restricting the evidence to sales in one village.

The Commission cannot perform its statutory duty by shutting its eyes. The Commission must hear and consider the evidence. The Commission has not conducted a fair, reasonable and statutory hearing and it erroneously employed piece-meal hearings which denied protestants a reasonable hearing.

The objections which were made before the Joint Board were vigorously presented before the Division and before the Commission in numerous petitions and exceptions. See Exhibits "C," "D," "E," "F," and "G" of the appendix to the complaint.[45]

The Commission refused to act on the petitions for a consolidated hearing while the cases were pending and then after the record was closed it denied all of the petitions. See Exhibit "F" of the appendix to the complaint.[46]

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[44]R. 39-42 and 464-466.
[45]R. 44, 45, 48, 52.
[46]R. 52.

It will be noted, as shown in complaint Exhibit "A-2,"[47] that the first hearing was held before a Joint Board on June 11, 1937 and the last hearing, involving the 8 sub applications, which were filed February 23, 1937, was held on June 15, 1937.

The first protest against the procedure being followed was filed with the Commission on June 11, 1937, as shown by Exhibit "C,"[48] appendix to the complaint. A more formal protest and exceptions were filed on June 14, 1937, as shown by Exhibit "D," appendix to the complaint.[49] A further petition was filed January 27, 1938, Exhibit "E."[50] The Commission failed and refused to act on any of these petitions and protests until February 16, 1938, as shown by Exhibit "F," to the complaint.[51] That was long after the hearings had closed and after protestants had been forced to file exceptions to Joint Board reports and about the time that the Commission was ready to issue its report, which was done on July 11, 1939, as shown by Exhibit "L."[52]

Plaintiffs acted promptly and diligently at every stage of the proceeding to secure a fair hearing. However, the Commission failed to even rule before the hearings were closed and plaintiffs were deprived of any opportunity to introduce evidence before the Commission.

Joint Board Findings

Despite the handicaps some evidence got in. Enough of protestants' evidence got in to cause some of the Joint Boards to deny some of the applications and to find that there was enough motor carrier service available.

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[47] R. 32.
[48] R. 44.
[49] R. 45.
[50] R. 48.
[51] R. 52.
[52] R. 81.

Joint Board No. 103, which considered Subs 2, 4, 5, and 6, rendered its report on November 27, 1937, which report is set forth in full as Exhibit "K," of the appendix to the complaint.[53] The Joint Board referred to the service being offered by numerous motor carriers and their willingness to coordinate their services with the railroad. The Joint Board concluded that a railroad has no inherent right to change the means of transporting its traffic from its rail to motor vehicles. It further held that when it seeks to do so, it must assume the burden of proving public convenience and necessity. The Board further held that the railroad had no more right to invade a territory already adequately served by existing motor carriers than another motor carrier would have. The Board further found that if motor carrier service is better than rail service that the shipments should move by trucks rather than by railroad.

This Joint Board was considering applications involving about 450 miles of rights applied for, and concluded to grant rights only between Hamlet and Sanford, or a distance of 52.5 miles.

Other Joint Boards similarly denied rights which the railroad applied for. However, Division 5 of the Commission reversed the Joint Boards and granted all of the certificates applied for and did so without further hearing or further evidence. See report by Division 5 set forth in full as Exhibit "L," of the appendix to the complaint.[53]

In reviewing the Joint Board's decisions, Division 5 stated that the Joint Board had undertaken to limit the railroad, to service which is auxiliary and supplemental and that *the applicant railroad had indicated that they were unwilling to be so restricted.*[54] Protestants fear competition for traffic that does not originate or terminate on the railroad, as the Division found.[55]

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[53] R. 81.
[54] R. 102.
[55] R. 102.

The Commission Continued to Exclude Evidence

After Division 5 had reversed the Joint Boards and granted the certificates applied for and after the full Commission had *abolished the condition requiring a prior or subsequent movement by rail* and had, without evidence, inserted so-called key point restrictions, the Seaboard Air Line Railway, intervener here, petitioned the Commission for further hearing, for the purpose of removing the key point restrictions. On July 25, 1941, the Commission issued its order reopening the case for modification of the key point restrictions. See Exhibit "N" of the appendix to the complaint.[56]

At this point a startling change in procedure occurred. Throughout the hearing before the Joint Boards, the protestants had petitioned and petitioned the Commission to consolidate the hearings. After these hearings were over the Commission denied the petitions. When the railroads desired a hearing in connection with the removal of the key point restrictions, the Commission consolidated all the applications and set the matter down for hearing before an examiner. See Exhibit "O" of the appendix to the complaint,[57]

When the railroads petitioned for a further hearing the Commission recognized that the subject matter was one which only could be dealt with in the aggregate. It changed its mind about the meaning of Section 205, relating to Joint Board hearings, because it disregarded the Joint Boards and a hearing on all the applications was held exclusively before an examiner for the Interstate Commerce Commission. This was the procedure protestants had long sought. Now they would be able to put in some evidence showing that public convenience and necessity did not require the operations and that they would result in des-

[56] R. 135.
[57] R. 136.

tructive competition and in restraint of competition. But the Commission did not propose to hear any of their evidence, so, the Commission restricted the scope of the hearing and said in its order reopening the case for further hearing "solely to determine whether condition 3 as set forth in the prior report, 28 M. C. C. 5, should be modified".[58]

When plaintiffs sought to cross-examine the railroad witnesses or to introduce evidence they were informed that the hearing on the numerous applications was consolidated for the purpose of hearing evidence on the subject matters in which the railroads were interested.

Intervention of Department of Justice

Between the dates of the hearings before the Joint Boards and the consolidated hearing on petition of the railroad, the Anti-trust Division of the United States Department of Justice had observed the Commission's administrative procedure and its refusal to receive evidence. Therefore it determined to intervene in the reopened proceedings.

The protestants and the Department of Justice soon learned that this hearing was for the sole purpose of hearing the railroad. The examiner insisted on limiting the proceedings to what the railroads wished to show and closed the hearing on that basis.

Confronted with this procedure, on December 5, 1941, both the Department of Justice and the American Trucking Associations petitioned the Commission for further hearing. The petition of the Department of Justice is set forth as Exhibit "P", of the appendix to the complaint,[59] and the petition of the American Trucking Associations

[58] R. 136.
[59] R. 137.

is set forth as Exhibit "Q" of the appendix to the complaint.[60]

On January 21, 1942 the Commission denied the petitions of both the Department of Justice and the American Trucking Associations. See Exhibit "R" of the appendix to the complaint.[61]

On July 6, 1942 the Commission issued its order modifying the certificate which it had issued the railroad and removed most of the key points. See Exhibit "S" of the appendix to the complaint.[62]

On November 30, 1942 the Commission issued a certificate of convenience and necessity to the railroad without any conditions for a prior or subsequent movement by railroad and with most of the key points removed. See Exhibit "T" of the appendix to the complaint.[63]

On October 21, 1943 plaintiffs brought this suit to set the Commission's order aside.

The rulings of the examiner, at the reopened hearing, on the exclusion of evidence are summarized in Exhibit "P" filed by the United States Department of Justice[64] and in Exhibit "Q" filed by the American Trucking Associations.[65]

All of the evidence which the Joint Board refused to hear because the applications were split up for hearing was also refused by the Commission after the case had been consolidated for hearing.

At each and every stage of the proceedings there was a complete denial of a fair hearing; and failure and refusal to hear evidence upon which either the issues of

[60] R. 142.
[61] R. 151.
[62] R. 151.
[63] R. 161.
[64] R. 137.
[65] R. 142.

public convenience and necessity might be determined under Sec. 206 or the issue of restraint of competition under Sec. 205(b).

This denial of a fair hearing was recognized by Judge Paul in his dissenting opinion.[66]

Point 5.—Failure to Make Findings.—The Commission Failed To Make the Findings Required By Statute and Substituted Conclusions For Findings.

The legal questions involved in failure to make findings generally, are so elementary that we will not belabor the matter.[67]

There are involved in this case two sections of the Act which require findings on specific subjects.

Certificates of convenience and necessity are covered under Sec. 206(a) which provides that such certificate may be issued—

> "if it is found * * * that the proposed service * * * is or will be required by the present or future public convenience and necessity."

Under Point 1 we discussed the policy of the Commission and undertook to demonstrate that the Commission issues certificates pursuant to a policy, as distinguished from proof of public convenience and necessity.

Under Point 2 we discussed the Commission's waiver of proof of public convenience and necessity.

Under Point 3 we discussed the issuance of hybrid certificates for part rail and part motor operations.

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[66] R. 216.

[67] *Yonkers* v. *U. S.*, ... U. S. ....., 88 L. ed. 241.
Eastern-Central M. C. Assn. v. *U. S.*, ... U. S. ....., 88 L. ed. 431.
Florida v. *U. S.*, 282 U. S. 194, 85 L. ed. 291.
U. S. v. *Chicago M. and St. P.*, 294 U. S. 499, 79 L. ed. 1023.
U. S. v. *B. & O. R. C.*, 293 U. S. 454, 79 L. ed. 587.

Under Point 4 we discussed the exclusion of evidence.

We will not repeat those arguments but will undertake to point out where it affirmatively appears that the Commission has substituted policy and conclusions for findings.

In the first *Kansas City* case[68] the Commission said:

> "The coordinated service which the railway contemplates establishing with applicant would embrace the entire system of the railway, and each and every one of its stations." (p. 236).
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> • • •
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> "As has been indicated, protestants contend that if applicant be given the certificate which it seeks, they will suffer severely from the new competitive service which it will offer, not only in conjunction with the railway but on its own account. Competition is already so keen in the territory concerned that protestants can ill afford any further diversion of business." (p. 237).
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> • • •
>
> "The railway now proposes to improve the handling of that traffic by establishing a coordinated truck-rail service in connection with applicant. As we have seen, the conclusion is warranted that there is a public need for this coordinated service, that it is a new and different character of service which neither the railroads nor the trucks alone can supply, and that it cannot be furnished effectively and well except through the use of applicant's facilities. We do not *believe* that the development of this new form of service will seriously endanger the operations of protestants, but, *in any event,* the public ought not to be deprived of the benefit of an improved service merely because it may divert some traffic from other carriers." (Emphasis supplied) (p. 237, 238).

The Court will note the absence of findings and the substitution of "belief". Then there is the further substitution of policy for findings:

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[68]10 M. C. C. 221

"* * * but, *in any event,* the public ought not to be deprived of the benefit of an improved service merely because it may divert some traffic from other carriers." (Emphasis supplied) (p. 238).

The report goes on to recite:

"In other words, there are plenty of motor carriers in this territory and it has not been shown that there is any need whatever for another motor carrier to furnish service such as the existing carriers furnish * * *". (p. 238).

The Commission found an abundance of motor carrier service but found need for a certificate for more service as a matter of policy as distinguished from proof of public convenience and necessity.

In the first *Seaboard Case*[69] the report contained the following:

"There seems little question as to the proposed rail-truck coordinated service being in the public interest, nor does it appear from the records made in these cases that there will be any great diversion of traffic from existing independent motor carriers." (p. 432).

It will be observed that the Commission does not make any findings whatever with respect to competition but merely recites that it does not "appear from the records made in these cases that there will be any great diversion of traffic from existing independent motor carriers."

May the Court be pleased, this is the identical case now before this Court. This is the identical case in which evidence has been excluded from start to finish. Having excluded the evidence the Commission naively refers to the absence of evidence.

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[69] 17 M. C. C. 413, R. 81.

Having excluded the evidence and having in its own report referred to the absence of evidence, how could the Commission possibly make the statutory findings required under Section 207 with respect to certificates and Section 5(b) with respect to restraint of competition?

In the *Pacific Motor Trucking Co.* (a railroad subsidiary) 21 M. C. C. 761, the Commission said:

> "While adequate motor-carrier service, as such, is no doubt available, we have somewhat consistently refused to compel rail carriers to make their coordinate efforts dependent on competing motor carriers." (p. 763).

It is obvious that the Commission does not make findings as contemplated by the Act but is merely substituting its policy for findings.

Then, in the second *Kansas City Southern case*,[70] the full Commission said:

> "* * * we believe it to be neither the policy of Congress nor the proper function of this Commission to retard any form of progress in transportation which will serve the public interest." (p. 10).

Commissioner Lee, dissenting, said:

> "* * * that there are plenty of authorized motor carriers in operation throughout the territory * * * the present facilities for the movement of freight wholly by motor vehicle * * * are adequate * * * the record fails to establish that there is any need whatever for it to provide a service such as the existing motor carriers are furnishing * * *". (p. 23).

Commissioner Lee dealt with the facts but the full Commission dealt with policy.

We submit that the Commission has made no findings as such in any of these cases. The Commission has stated

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[70] 28 M. C. C. 5, R. 109.

a number of conclusions but the conclusions have little if any relationship to any factual determinations which it should make under Sections 207 and 5(b). It seems clear to us that the conclusions are related to the Commission's policy and to that alone.

It follows as a matter of course, that where evidence is excluded and certificates are issued as a matter of policy, the Commission automatically brings itself to the necessity of substituting conclusions for findings.

The Court below was in error in holding that there was evidence upon which the Commission could base its conclusions.

To the extent that some evidence "filtered" in, as the Court below stated, that was merely a modicum or scintilla of evidence. As to whether a modicum or scintilla of evidence could be sufficient to support an order of the Commission we do not argue here. We say that even if a scintilla of evidence "filtered" in, the fact that the Commission excluded the substantial evidence, made its action arbitrary and capricious. Its conclusions were not based on the evidence which a fair hearing and the statutory provisions require.

But as to the fundamental issue involved here, there was not even a scintilla of evidence to support the Commission's orders.

We have shown that when these fifteen subapplications were filed, covering some 1200 miles of operating rights, they were assigned for separate hearings before numerous separate Joint Boards. Each Joint Board limited the evidence which it would receive to that which referred to the particular segment of highway involved in the particular subapplication which the particular Joint Board was hearing. In this way all evidence relating to any operations involving all or part of two or more segments was totally excluded from each and every hearing which the Joint

Boards conducted. We do not concede that any kind of a hearing by any Joint Board could have met the statutory requirements in this case. But for the purpose of argument only, we will assume that each hearing before each Joint Board was complete for the purpose of dealing with an application for a limited section of highway. The only hearings which were ever conducted with respect to either proof of public convenience and necessity, under Sec. 207, and with respect to restraint of competition, under Sec. 205(b), were limited to such subapplications separately. That was the state of the record when Division 5 took all of the subapplications and covered them by a single report wherein the Joint Boards were reversed.[71] That single report by Division 5 contained no limitations whatever with respect to confining the operations to the separate segments. The only conditions which Division 5 imposed are shown at the conclusion of its report.[72] So, Division 5 authorized motor carrier transportation without regard for the physical limitations of the routes separately applied for and with respect to which the evidence was so rigorously limited. As to the authorized operations, extending from one subapplication to another, there was not a scintilla of evidence.

The next step by the full Commission was the removal of a condition which Division 5 had imposed, and which is known as Condition No. 3 and required a prior or subsequent movement by rail. The full Commission removed this condition as to the Seaboard in a case entitled Kansas City Southern Transport Company.[73]

Here, the full Commission substituted key point restrictions on through operations, but these key points had no relation to the territory originally applied for in the separate subapplications and through operations involving more than one sub were authorized. There had been no

[71] 17 M. C. C. 413, R. 81.
[72] R. 105.
[73] 28 M. C. C. 5, R. 109.

further hearings and of course there was not a scintilla of evidence in connection with these operations. The next step was a reopening by the full Commission, of the key point restrictions which the Commission had imposed on the Seaboard. And again, the Commission modified the key point restrictions and authorized through operations involving more than one subapplication. This was done without any evidence whatever relating to convenience and necessity under Section 207 and restraint of competition under Section 205(b), for the simple reason that the order of the Commission reopening the cases specifically limited the scope of the hearing.[74] So, we have a third order authorizing through operations, with respect to which there has never been a hearing and not a scintilla of evidence in the record, dealing with convenience and necessity or restraint of competition.

The Commission refers to "new service" and that "different service", part rail and part motor. Those expressions are repeated throughout the Commission's reports.

On brief before the Court below, the Commission said that normal standards with respect to evidence are not applicable to hybrid operations. The Commission said:

> "The complaint charges the Commission with error in its refusal to permit the protestants and intervenors to introduce evidence or require applicant to produce evidence with respect to enumerated items set out on pages 16 and 17 of the complaint. As a result of this action, it is claimed, the Commission acted without substantial evidence and was disabled from making necessary finding required by the statute.
> "The fundamental error into which plaintiffs fall is the assumption that the service proposed by the railroad is a like and competitive service to that presently rendered by the truck operators along the route sought by the railroad, and consequently applicant should have been governed by the same criteria as obtained

[74] R. 136.

where a new motor carrier seeks to invade a territory already occupied by existing motor carriers. In the latter instance questions of adequacy of existing service, the competitive effect of a new service, estimated traffic, and the ability of the communities served to support the new enterprise are pertinent issues upon which the evidence to be introduced by the plaintiff might have had bearing. But these applications did not seek to establish a new and like transportation service; they sought merely authority to establish new methods of operation to provide a service equivalent to that which the railroad was already under a duty to render."

* * *

"In applications similar to the ones here involved the Commission in *Kansas City S. Transport Co., Inc. —Common Carrier Application,* 10 M. C. C. 221, 235, said:

> '* * * Moreover, it is clear that this coördinated rail-motor service will be a new form of service, utilizing both forms of transportation to advantage, and differing from the service given by the railway alone or by competing motor carriers alone.'

"Again in *Illinois Central R. Co.—Common Carrier Application,* 12 M. C. C. 485, 495, the Commission recognized as a new form the service contemplated by applications of this kind."

If the Commission is right about there being *no standards* for hybrid operations, then we are sure that there is *no law* authorizing a certificate for hybrid operations. Something must be left of the rule that the Commission exercises delegated authority only, and the rule with respect to delegation of powers.

The issue is reduced to its simplest terms. Where does the Commission get the authority to waive legal criteria, to create hybrid carriers; to make distinctions which Congress did not make?

Point 6.—Hearings - Forum.—The Commission Failed and Refused To Either Hear the Applications Itself Or To Refer Them For Hearing To A Properly Constituted Joint Board.

Plaintiffs contend that the Commission misconceived its statutory duty in assigning these railroad applications for hearing before a number of different joint boards which were not constituted according to statute.

Section 205 of the Interstate Comerce Act *requires* the Commission to assign application matters for hearing before a Joint Board where not more than three states are involved. Where more than three states are involved the Commission *may* assign the matter for hearing before a Joint Board or may hear the case itself. But that is not all. Section 205 prescribes the composition of a Joint Board and says:

> "The Joint Board to which any such matter is referred shall be *composed solely of one member from each state* within which the motor carrier or brokerage operations involved in such matter are or are proposed to be conducted." (Italics ours).

The Commission had before it at one time a series of applications for motor carrier rights involving four states, i. e., Virginia, North Carolina, South Carolina and Florida. Before these proceedings were concluded it had further applications involving a fifth state, namely Georgia, all as shown by Exhibits "A-3" and "V" of the appendix to the complaint, at pages 11a and 136, respectively.[75]

Not only did the Commission have motor carrier applications involving four or five states but the applications were filed by a railroad which operates in six states.

Clearly these applications involve more than three states and therefore it was discretionary with the Commission

[75] R. 34 and 169.

whether it referred the matter to a Joint Board or conducted the hearing itself. The Commission divided the applications and referred them to several Joint Boards instead of referring the applications to one properly constituted Joint Board. Instead of referring the applications to a Joint Board "composed solely of one member from each state" the Commission disregarded the statute and set up a series of Joint Boards. The Joint Boards which the Commission appointed were Nos. 2, 7, 103, 177 and 205, all as shown by Exhibit A-2 of the appendix to the complaint.[76] All of the Joint Boards were confined to members of the particular state or states in which the fractional application applied for was located, but disregarded through service over combinations of the subapplications.

Appellants contend that the provisions of the statute are such, that upon the Commission's election to refer the matter to a Joint Board, the applications should have been referred to just one Joint Board composed "solely of one member from each state", which would require the appointment of a member from Virginia, North Carolina, South Carolina and Florida to handle the 8 applications which were filed by the railroad on February 23, 1937, and upon the filing of additional applications in the State of Georgia, a Georgia member should have been added to the Joint Board.

In failing and refusing to appoint properly constituted Joint Boards the Commission not only deprived protestants of a fair and reasonable hearing but it deprived the Joint Boards of a fair and reasonable opportunity to even know what they were acting on. In fact, one of the Joint Boards frankly stated that until protestants brought the subject up, *they did not know that the other applications were pending.*[77]

[76] R. 32.
[77] R. 39, 40 and 314.

Legislative History

There is not much in the Congressional Record that is directly related to the composition of Joint Boards. Generally speaking, the legislative discussion ran to the proposition that the Act should provide for Joint Board procedure in order to recognize the interests of the states in these matters; and there was the further suggestion that Joint Board procedure would largely eliminate the necessity for applicants, protestants and other interested parties, making the long journey to Washington, D. C.

CONGRESSIONAL RECORD VOL. 79.

MR. WHEELER.

"The complaint which was made against this provision came to a large extent from one or two persons who complained that the present local commissions were dominated by the railroads, and said they did not feel that the local commissions should in any way have anything to say about interstate regulation.

"However, let me point this out, that wherever these bodies make recommendations, their recommendations go into effect unless someone objects, or unless the Commission itself refuses to adopt them. That is the practice where not more than three States are involved. Where more than three States are involved, then the Commission sends its own men out to hold the investigation."

* * *

"The bill contemplates submission of such matters to joint boards where the motor-carrier operation involved not more than three States and the optional use of the joint board procedure where a greater number is involved."

* * *

"MR. GERRY. May I ask the Senator why the number of States was fixed at three?"

"MR. WHEELER. It mentions three States. There could be 2 States or 3 States, according to my understanding of the bill, but if it exceeds 3 States, then

the Commission sends out its own representatives, because it is felt that if there are more than 3 States it would be difficult, perhaps, to get them together." (C. R. 5880).

The Statute Is Clear

The statutory provisions of Section 205 are clear and unambiguous. There is the provision that if more than three states are involved, the Commission may submit such matters to *a* Joint Board, and then there is a second provision that *the* Joint Board "shall be composed solely of one member from each state".

Fair Hearings Defeated

The railroad applicant split its application of February 23, 1937 into a large number of subs, which were heard by separate Joint Boards.

The practical effect of this form of filing applications is illustrated by the Commission's holding of separate hearings. The effect of this procedure was to deprive protestants of an opportunity to question the application as a whole.

The result of dividing the hearings was to obscure the collective evidence.

Throughout the hearings before the Joint Boards, there was a persistent and consistent refusal of the applicant to permit protestants to develop any information with respect to the combination of any of the applications.

When it happened that more than one application was assigned for hearing before the same Joint Board on the same date, the proceedings were kept separate.

When, upon protestants' insistence and upon orders of the Joint Board chairman some of applicant's general witnesses gave general testimony that was applicable to more

than one application, the applicant refused to allow protestants to cross-examine on the application collectively.[78]

That we are dealing with a matter of the greatest substance is shown by the refusal of the applicant to agree to any limitations on the operating authority applied for[79] and the fact that the Commission, pursuant to request of the applicant, never has restricted operations to the separate segments applied for.

On cross-examintion, Mr. W. L. Stanley, Vice President of the Seaboard Air Line Railway, explained the filing of the separate applications as follows:

> "A. No; I can explain how that happened. We have on the Seaboard Air Line Railway six operating divisions, in charge of six different superintendents. To all intents and purposes, except for the purpose of coordinating through movements, those territories represent little railroads of their own. Now, in making up these applications for truck certificates, they were studied in respect to the several divisions of the railroad—what would be most desirable on those divisions, and especially in respect to their local situations, and with no idea on earth of coordinating those several movements except where they might happen to match up with each other." R. 383.

Please note carefully what Mr. Stanley said. He said they were separate operations to the extent that they fall within the jurisdiction of separate superintendents. However, he clearly stated that being separate with respect to separate superintendents did not mean being separate with respect to through operations. He further stated that they had no idea of conducting through operations except where the applications "match up with each other". Exhibit A-3 (R. 34A) shows the extent that the applications to date do match up.

[78] R. 523-534.
[79] R. 37, 39.

It was shown by the testimony of other witnesses for the Seaboard that they had arranged through truck schedules that were faster than rail service and that would be the most economical way of handling freight. (R. 261).

That position on the part of the railroad applicant was, among other things, the reason why the protestants demanded that the hearings be consolidated, because it was obvious that the railroad intended to conduct through operations.

Later there came on for hearing the consolidation of all of the applications for the purpose of removing key point restrictions. The railroad wanted them all removed and the Commission removed most of them. The Commission prescribed certain typical key points.

According to the Commission's order of July 6, 1942, set forth in full as Exhibit "S" at page 120 of the appendix to the complaint,[80] the Seaboard may transport freight wholly by motor vehicle, that is without a prior or subsequent movement by rail, from but not including Richmond, to but not including Raleigh, a distance of about 170 miles, involving applications Sub 2 and Sub 7, which applications were heard by different Joint Boards.

The railroad may transport freight wholly by motor vehicle, without a prior or subsequent movement by rail from but not including Henderson, to but not including Hamlet, a distance of about 190 miles, involving applications Sub 2 and Sub 4, which applications were heard by the same Joint Board.

The railroad may transport freight wholly by motor vehicle, without a prior or subsequent movement by rail, from but not including Raleigh, to but not including Columbia, a distance of about 225 miles, involving applications Sub 3 and 1, which applications were heard by different Joint Boards.

[80] R. 151.

The railroad may transport freight wholly by motor vehicle, without a prior or subsequent movement by rail, from but not including Jacksonville, to Sebring; a distance of about 210 miles, involving applications Sub 9, 18, 19, 21, 22, 23, 24 and 25. All of these applications were heard by Joint Board 205 but on dates extending from 1937 to 1941.

The vice of all these proceedings lies in the fact that the Commission misconveived its statutory duty. The Commission can only exercise its administrative discretion within legal bounds.

> "It has broad powers and a wide extent of administrative discretion, with the exercise of which, upon evidence, and within its statutory limits, the Courts do not interfere. * * * But the Commission, exercising a delegated regulatory authority which does not have the freedom of ownership, operates in a field limited by constitutional rights and legislative requirements."[81]

Inconsistent Position of Commission

Let us see what the position of the railroads have been in matters of this kind.

When a independent motor carrier filed an application for a certificate of convenience and necessity to extend its operations and the Commission referred the application to a substandard Joint Board the railroads objected vigorously.[82] Independent motor carriers did not oppose the application but the railroads did. Two subapplications were involved, one for an extension in Kansas, which was heard by a Joint Board composed of one member from Kansas. A second application was for an extension in New Mexico and was heard by a Joint Board composed

[81] *A. T. & S. F. Ry. Co.* v. *U. S.*, 284 U. S. 248, 262; 76 L. ed. 273, 281.

[82] Herman Clary Common Carrier Application, 32 M. C. C. 5, decided January 26, 1942.

solely of a representative of New Mexico. The Commission said:

> "No motor carriers opposed the applications. Protestant rail carrier, however, submitted evidence. * * *" (p. 27).

So the only protestants were rail carriers and what position did they take?

The Commission's report shows:

> "Protestants also contended that the applications were assigned for hearing before wrong joint boards, urging that under Section 205(a) of the act they should be referred to boards composed of representatives of all the states involved, or by an examiner."

When this Joint Board point was raised by the railroads the Commission thought it had some merit.

> "As indicated earlier herein, the applications together seek to extend applicant's present operations so as to permit operations between points in Kansas and New Mexico, and between such points, on the one hand, and points in the three States previously authorized, on the other. It follows, therefore, that the operations under consideration will be conducted within five States and not merely within Kansas and New Mexico, respectively. Accordingly, as protestants contend, the two applications, which in fact cover but one operation, should have been assigned for hearing before a joint board composed of a representative of each of the five States, or before an examiner. (Citing cases) In the circumstances, however, we believe that we are warranted in proceeding to a final decision upon the records as made without reassigning the applications for further hearing. Full and complete hearings have been held, and if possible, we desire to avoid a further hearing herein, with its attendant inconvenience and expense, and at the same time to protect the rights of all interested parties. Accordingly, we shall dispose of the applications now, but shall direct that the issuance of the certificate granted herein be withheld

for 30 days after service of this report to afford any interested party an opportunity to petition for rehearing before an examiner or an appropriate joint board." (p. 8).

During all these long years, since 1937, the independent motor carriers have been trying to establish this simple proposition of statutory construction.

The Commission either refused to rule or summarily dismissed every petition filed.

Judicial History of Joint Boards

In a recent motor carrier case, decided by the United States District Court[83] the Court had occasion to refer to Joint Board proceedings. The facts were quite different from the case at bar, but the question of fraud was considered. There the applicant applied for rights in four states and the Commission assigned the matter for hearing before an examiner. During the course of the hearing, applicant abandoned its application for one state, thereby reducing the number of states involved to three. Protestants then insisted that the Commission should immediately refer the matter for hearing before a Joint Board, inasmuch as only three states were involved. The Court quoted the opinion of the Commission from 32 M. C. C. 621:

> "In the absence of any showing of any intentional deception, or fraud, an application, once lawfully referred either to an examiner or to a joint board of either three or two members, may properly be disposed of by such referee, even though during the course of the hearing applicant wholly fails to support or otherwise abandons his proposal as to one or more States, so that the number actually finally involved is less than originally appeared."

[83] *North Coast T. R. Co.* v. *U. S.*, U. S. D. C. N. D. of Calif., S. D., decided March 3, 1944.

The Court then went on to say:

> "There is no evidence of fraud or deception on the part of West Coast, and plaintiffs stated at the hearing that they made no claim of bad faith."

Plaintiffs here do allege fraud. They have continuously alleged it. The fact that the Seaboard Air Line Railway filed numerous applications on the same date instead of filing one application was in and of itself an indication of fraud. At the very first day of the first hearing, applicant refused to agree to any limitations which would limit their operations to the separate segments. Such a course of conduct is sufficient to establish fraud.

Another case is *Empire Trials, Inc.*, v. *U. S.* 53 Fed. Sup. 373. In our opinion that case may be disposed of very briefly. First, the Court points out that protestants did not raise the jurisdictional issue when they had an opportunity to do so. That is certainly not true of our case. Furthermore, Section 205(b) specifically provides that the Commission may proceed with a hearing if a joint board member or members fail to participate in a hearing. The Commission only has the duty of appointing a properly constituted joint board, and it cannot compel them to either hear or decide cases. If they fail, the Commission may proceed without their aid. In our case the Commission neither appointed proper joint boards nor conducted the hearings itself.

Commission's Argument Is Not Sound

In *Carolina Scenic Coach Lines* v. *U. S.*, 56 Fed. Supp. 801, affirmed by this Court in No. 637, Oct. Term, 1944, plaintiffs undertook to raise before the Court the issue of proper Joint Boards. However, they did not raise that issue either before the Joint Board or before the Commission.

The position of the Commission seems to be that an aggregate of substandard joint boards can be added together and constitute the equivalent of a properly constituted joint board.

If several substandard joint boards held joint hearings, and admitted and considered the evidence, the error in appointments, might become harmless. We have no such situation here, because each substandard joint board conducted separate hearings and excluded all evidence relating to any matters pending before any other joint board, although all of the applications were necessarily related and evidence relating to the composite railroad program was essential to the Commission's performance of its statutory duties.

The contention made below, that variations in the proof, or in the position of the parties, would necessitate reassignment and rehearing is founded on nonexistant "ifs." That could only be true "if" the Commission had the power to appoint substandard joint boards, in which event the enlargement of the position of the parties might quickly go beyond the jurisdiction of a substandard joint board. But the Commission does not have power to appoint a substandard joint board, so the administrative difficulty suggested rest solely upon the failure of the Commission to appoint a joint board as provided by statute.

Applying the facts in our case, we find that the first group of applications were eight in number and were filed on the same day. There was nothing on the face of these applications to indicate that they would not be joined for operation purposes. Shortly after the first group of applications were filed, other applications were filed, before any of them were set for hearing. As filed, most of the applications adjoined each other and formed continuous routes. Some of the applications, which did not adjoin other applications, adjoined operations already

conducted by the railroad under its "grandfather" clause rights.

There was something more than the bare filing of numerous separate applications which adjoined some other operation, to suggest that through operations were contemplated. The Court will observe that the main docket number of these cases is MC 86687, which covered the segment from Gaston to Garnett, South Carolina. All of the other applications were designated by the Commission as subs of the main docket number. Obviously the Commission considered the subs as being parts of something, or they would not have been designated as subs. The main docket number MC 86686 was not the original docket number of the "grandfather" rights of the Seaboard Railway, as that docket number was MC 28984, as shown at pages 59 and 76 of the appendix to the complaint.[83a] From an examination of the record of the hearing on Sub. 7, at R. 484-488, it appears that Docket MC 86687 was designated as a "new operation," and that the subs were designated as "extensions." Extensions of what? They could only be extensions of the main docket, or of the "grandfather" rights, or of each other. Any view that is taken of the matter suggests operations beyond the limits of any particuar segment and suggests extension of rights, either already held, or applied for. But, regardless of any doubts which may have existed with respect to the original intentions of the railroad, the record removed the doubt, and the latest orders of the Commission, fixing key points, did consolidate several subs.

The Commission suggested that the filing of separate applications was reasonable justification for it to conduct separate hearings, but, separate or otherwise, four or five states were involved.

There was no reason to assume that separate applications indicated separate operations. The Commission

[83a] R. 84, 102.

might have recognized the facts that separate applications have the effect of depriving protestants of an opportunity to cross examine on the entire proposal, or to present their own case with respect to the entire proposal (Subs (2) (4) (5) (6), p. 10-17).[83b] That record discloses the real position of the applicant and the vice of the separate applications.

Regardless of the fiction of motor-rail-motor, operations as distinguished from all motor operations, the undisputed facts are that the traffic to be originated and terminated on each sub would originate or terminate on every other sub. Under those circumstances, it would be immaterial whether the connecting link between truck operations be rail, or another truck operation.

If this hybrid operation, part rail and part motor, is a motor carrier for the purposes of motor carrier certificates, then it must be a motor carrier for the purpose of intergrating the routes covered by the various sub applications.

The falacy of the Commission's reasoning can be demonstrated by an illustration. There are many large railroad systems holding extensive motor carrier rights, involving thousands of miles of highway. Under the Commission's theory, if a large railroad system holding motor carrier right to ten thousand miles of highway, serving one thousand communities, in fifteen states, applies for an additional thousand miles of highway, serving an additional hundred communities, in two additional states, the Commission would hold, or did in the Seaboard cases, that only two states are involved, and that such application might be heard by a two states joint board, instead of being heard by the Commission. There is not the slightest question that, under any of the restrictions which the Commission ever imposed, or now imposes, freight could and

[83b] R. 530-535.

would originate by motor truck on any of the routes covered by the original ten thousand miles, and terminate on any of the routes covered by the additional thousand miles, or vice versa. Motor carrier service would be the means of originating and terminating traffic flowing between seventeen states. The connecting link might be rail, or it might be motor. But, regardless of the nature of the connecting line, seventeen states are involved.

Under the Commission's theory, protesting motor carriers could only inquire as to the traffic originating or terminating on the additional thousand miles sought, and are foreclosed from even referring to the fact that this same traffic will originate or terminate by motor vehicle in fifteen additional states. That is the evidence which both the joint boards and the Commission excluded in the Seaboard cases. That is the evidence which the separate hearings excluded.

The Commission erred in the appointment of substandard joint boards, and erred in depriving protestants of a fair and reasonable hearing, and erred in failing to develop the facts which were essential to a fulfillment of the Commission's statutory duties.

MISCELLANEOUS

Laches

Intervener Seaboard Air Line Railway, undertakes to spell out a case of laches, in paragraph XVI of its answer.[84]

At no time prior to November 30, 1942, when the Commission issued the certificates complained of, could plaintiffs have brought an action to set aside the order of the Commission. As disclosed by the index to the appendix to the complaint[85] and as further disclosed by Exhibit "U" of the appendix to the complaint,[86] from 1937 to 1942 there

[84] R. 188.
[85] R. 1, 2.
[86] R. 166.

was a continuing unbroken series of administrative proceedings pending before the Commission. It is elementary in proceedings of this kind, that no action may be brought to set aside an order of the Commission until administrative remedies have been exhausted.

The Commission issued the final certificate on November 30, 1942 and this suit was filed on October 21, 1943. Considering the multiplicity of proceedings and issues, as disclosed by the complaint, it is clear that plaintiffs acted with the uttermost expedition.

Interveners say that a certificate was issued on September 30, 1939 and a further certificate on April 4, 1940. But those are not the certificates being attacked here. Those certificates were issued by Division 5 and not by the full Commission. Those certificates were issued before the full Commission had decided the *Kansas City Southern* case, on January 24, 1941, reported in 28 M. C. C. 5.[87] Those certificates were modified by the full Commission. It was in the second *Kansas City Southern* case, 28 M. C. C. 5, which case included the Seaboard applications, that the Commission removed the restriction requiring a prior or subsequent movement by rail. Between 1939, when the first certificate was issued by Division 5, and 1942, when the final certificate was issued by the full Commission, the whole series of petitions and proceedings were still pending before the Commission, as disclosed by the index to the appendix and by Exhibit "U" of the appendix to the complaint.[88]

The defense of laches could not possibly be available to the intervener. Where the charge involves statutory powers, laches, if present, could not serve to breathe validity into illegal orders.

[87] R. 109.
[88] R. 166.

In each of these certificates the Commission included the following paragraph:

> "*It is ordered,* That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier."
>
> • • •
>
> "*It is further ordered,* and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change or revocation of this certificate.
>
> "*And it is further ordered,* That this certificate shall supersede the certificate issued in this proceeding on September 30, 1939, and that issued under Docket No. MC-86687, Sub 10, on April 4, 1940, which are hereby canceled."

See Exhibit "T", of the appendix to the complaint,[89] for the certificate.

It is clear from the foregoing that the certificate was subject to the continuing power and jurisdiction of the Commission to modify the certificate, and, of course, no vested right as such had ever become attached.

The certificate conditions require "reasonably continuous and adequate service".

The indifference with which the Seaboard has conducted the authorized operations puts the matter of laches on them.[91] We have consistently contended that only rail-

[89] R. 161.
[91] R. 201, 202.

road convenience was involved and the railroad proved our point. What became of the public convenience and necessity which the Commission found?

The next proposition set forth, under the defense of laches, is that in the period intervening between the issuance of said certificates and the filing of this action, intervener invested "in excess of $56,000 in equipment". They failed to prove that statement and abandoned it.[90]

The next general statements by intervener have to do with alleged savings in freight cars, etc. Those are matters which should be considered by the Interstate Commerce Commission. We respectfully refer the Court to our petition of December 5, 1941, Exhibit "Q" of the appendix[92] to the complaint, wherein we requested the Commission to require the railroad to produce this information, and our petition was denied by the Commission. The railroad having failed to submit this evidence to the Commission and the Commission having refused to require the railroad to do so, it is obvious that it cannot be considered initially by the Court.

Further replying to the general allegations set up by the intervener, under the heading of laches, we invite the Court's attention to Section 210a(a) of the Interstate Commerce Act, which is as follows:

> "210a. (a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify *but for not more than an aggregate of 180 days,*

[90] R. 201.
[92] R. 142-150.

and shall create no presumption that corresponding permanent authority will be granted thereafter. *The Second War Powers Act removed the italicized phrase until December 31, 1944. After that date it will be in effect again." (Further extended to Dec. 31, 1945.)

There is no possibility of injury either to plaintiffs or to the public by having the issues presented in this case determined with reference to legal principles. Under the War Powers the Commission has authority to grant *temporary* authority certificates without hearing and without notice to any parties.

Defenses based on laches in cases of this kind, so far as we can ascertain, have never been approved.[93]

Power to Remand

In the answer of the intervener, Seaboard Air Line Railway, Paragraph I, they deny the jurisdiction of the Court to remand matters complained of to the Commission for further proceedings in accordance with plaintiffs Prayer No. 3, as set forth in the complaint.[94]

There are many precedents for remanding cases to administrative agencies for further proceedings in accordance with the opinion and orders of the Court. In entering such orders the Courts are not in the position of substituting their judgment for that of administrative bodies charged with the duty of exercising discretion or making factual determinations.

This Court has been careful to point out that in reviewing a determination by an administrative agency the Courts do not usurp the duties and functions of the ad-

[93] *Texas & P. R. Co.* v. *Gulf & S. F. R. Co.*, 270 U. S. 266; 70 L. ed. 578. *B. & O. R. Co.* v. *U. S.*, 264, U. S. 258; 68 L. ed. 667.

[94] R. 22.

ministrative agency. *Federal Power Commission* v. *Pacific Power & L. Co.* (1939) 307 U. S. 156; 83 L. ed. 1180.

> "And so it is claimed that any action of a court in setting aside the order of the Commission would be an empty gesture, since without permission a transfer would be unlawful. But this proves too much. • • • The court has power to pass judgment upon challenged principles of law insofar as they are relevant to the disposition made by the Commission. • • • In making such a judgment the court does not intrude upon the province of the Commission, while the Constitutional requirements of 'Case' or 'Controversy' are satisfied. For the purposes of judicial finality there is no more reason for assuming that a Commission will disregard the direction of a reviewing court than that a lower court will do so."

Brotherhood of Railroad Trainmen v. *National Mediation Board* (1936) 66 App. D. C. 375; 88 Fed. (2nd) 757, was an appeal to reverse the action of the District Court in dismissing the bill of complaint. The case involved a determination by the National Mediation Board of the classes of members of the union entitled to be represented in a certain proceeding before the Board.

> "But because it is impossible to determine this question without a fuller disclosure of the facts, we express no opinion on the question and suggest it only as showing the necessity for a fuller hearing than was had.
>
> "In addition to this, it is charged in the bill that the Board declined and refused to inform appellants of the facts upon which the Board based or made its designation or rule as to who were eligible to participate in the election on the ground that this information was obtained through its examiner and should not be divulged. This, in our opinion, was wrong—for, as was said by Mr. Justice Brandeis in *United States* v. *Abilene Company*, 265 U. S. 274, 288, 'Nothing can be treated as evidence which is not introduced as such.' "

"From all of this it is obvious that the Board acted in this dispute *without affording appellants any real hearing,* and this, it is needless to say, was the sort of arbitrary action which *no court*—when its jurisdiction is invoked—*can approve.*

"In this situation, our conclusion is that the case should go back to the District Court with directions to set aside its former order and remand the case to the Board with instructions to annul its certification and to afford the contesting employees and Brotherhood a full hearing and then to reach a decision based only on evidence adduced at the hearing and supplemented by a finding of facts on which it rests its conclusion. When this has been done it may appear that the result of the election would have been the same, so that no new election will be required; but in any event the courts, if then called upon to review the matter, will have before them a record on which to determine whether the decision is arbitrary or capricious."

Answer of Interstate Commerce Commission

In Paragraph 15 the defendant, Interstate Commerce Commission, answered further and among other things said that the Commission determined the matters "in the light of its own knowledge and experience". The Courts have had occasion to consider that contention:

"Facts conceivably known to the Commission but not put in evidence, will not support an order."[94a]

"Nothing can be treated as evidence which was not introduced as such."[94b]

[94a] *B. & O. R. Co.* v. *U. S.*, 264 U. S. 258, 68 L. ed. 667.
[94b] *U. S.* v. *Abilene Co.*, 265 U. S. 274, 288.

Seaboard Opposed Applications Filed By Independent Motor Carriers

During the time and times when the Seaboard, was insisting that it could prove that public convenience and necessity required more motor carrier service (if the Seaboard were the operator), it opposed independent motor carriers when they sought to supply service to the public.

As might be expected, they contended that there was not enough traffic available in the territory to support more service. We quote from the record in Subs 9 and 10, p. 198, 199: (R. 771, 772).

"Q. (By Mr. Abeles) Mr. Stanley, frequent references have been made on cross examination of previous witnesses to the attitude of the Seaboard Air Line towards other independent motor carrier service in this territory. What have you to say on that subject?

"A. I have been an officer of the railroad and of the receivers charged with the duty of determining whether or not opposition should be made to applications of independent motor carriers to establish routes in the territory that the Seaboard serves. A great many of the independent operations in Seaboard territory, and I think I might safely say the State as a whole, are covered by certificates granted under the grandfather clause of the motor vehicle act, and I think that is true as to those operations that probably come under the grandfather clause of the Federal act, most of them. Now, when applications are filed to establish truck routes in a territory that is served by the railroad, we have usually opposed them and we have opposed them upon these grounds, that throughout this territory in Florida the density of traffic is not very great; that there is not suf-

ficient business in the territory to justify the operation of competing forms of transportation; and we have taken the position that our rail service in view of those facts is sufficiently adequate to take care of the traffic that is available in the territory. We have endeavored to show that fact, that our service is adequate when measured by the amount of traffic to be handled.

"Now, what we are seeking to do is not to establish a new and different method of transportation, but to improve a service which we believe if considered solely from the standpoint of rail transportation is adequate, by supplementing truck service to handle that business.

"Q. (By Examiner Yardley) The question, according to my understanding, is why you do not desire to interchange with truck lines.

"A. I didn't understand it that way."

The independent motor carriers testified that they were operating at 40 per cent of capacity (Sub 19, p. 185).[95]

But the full Commission granted the Seaboard the certificates which it applied for.

Classifications—Section 204(b)

The Commission, at the hearing below sought to justify its action in creating hybrid operations and exemptions therefor, by reference to Section 204(b).

That section provides:

"the Commission may from time to time establish such just and reasonable classifications of brokers or of groups of carriers included in the term 'common carrier by motor vehicle' * * * as the special nature

[95] R. 1037, 1038.

of the services performed by such carriers or brokers shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this part, to be observed by the carriers or brokers so classified or grouped, as the Commission deems necessary or desirable in the public interest."

Early in the administration of the Motor Carrier Act, the Commission established a classification of carriers under that section.

Its findings and classifications are set forth in *Classification of Motor Carriers of Property*, 2 M. C. C. 703, decided August 9, 1937. That classification did not recognize or establish a class of carriers, part motor and part railroad, nor a class of carriers, owned by railroads. There are two qualifications in the section which destroy the Commission's *present* contentions. The classification, if made, must be "just and reasonable" and "consistent with the provisions of this part".

We are not aware of any decision in any railroad case, in which the Commission has relied on that section. It must be an after thought. That section relates to carriers which Congress has recognized—and not the hybrid carriers which the Commission has created.

Parker v. U. S.

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In general, the issue of applicable legal criteria is presented in that case.

Other issues which are presented by our case, were not there involved.

The facts are somewhat different in the Parker and the Seaboard cases.

The Parker case did not involve splitting the application up into segments for hearing before numerous joint boards; it did not involve the failure and refusal to hear protestants' evidence; and it did not involve direct truck operation by a railroad without motor carrier tariffs and accounting.

In the Parker case, the applicant was a wholly owned subsidiary of the Pennsylvania Railroad, and the subsidiary was and is operated as a motor carrier. The subsidiary had been acquired by the Pennsylvania Railroad under Section 5 proceedings. Furthermore, the subsidiary was an original "grandfather clause" motor carrier under Section 206 of the Motor Carrier Act (21 M. C. C. 405).

The subsidiary sought to extend its line in order to serve its railroad owners, in additional territory, and thereby arose the issue of public convenience and necessity.

In the Parker case, the Department of Justice was confronted with the contentions of both the Commission and the plaintiff. It did not adopt, without qualifications, the position of either side.

As we understand the position of the Department of Justice, in the Seaboard cases, they support the plaintiffs, because they were denied a fair hearing; because the applicants position tends toward monopoly and because protestants do not seek a monopoly. We have not asserted that the Commission may not grant additional operating authority, if required by public convenience and necessity, upon the exercise of discretion within the statutory standards, recognized and applied, but, on the contrary, we contend that the Commission, in our case has disregarded legal criteria, and also failed and refused to conduct a fair and reasonable hearing.

We have not said that appellants cannot be subjected to more competition simply because they were there first,

and, *ipso facto,* no more competition shall be permitted. We say that proper procedure, with due regard for legal criteria must be observed. We have not placed an arbitrary administrative ceiling on public convenience and necessity for motor service. We contend that there is no statutory authority for the issuance of motor carrier certificates of convenience and necessity, based solely on railroad convenience.

In the Parker case, as we understand it, the Department was in some doubt as to how far plaintiff's position went as to monopoly. Being in doubt, it was not prepared to risk other issues, involving public policy, even though it may have recognized errors on the part of the Commission. In our case, the errors of the Commission were too great.

Reference To The Commission

(Commented on by the Court below)

The introductory comments in plaintiffs brief before the court below, were specifically designated as part of the record to be certified and likewise the comments before the court, below on argument were designated.

"We believe that the Commission has grossly exceeded statutory bounds and disregarded the will of Congress.

"We undertake the burden of proving our case along these lines.

"Before proceeding further, we disclaim any intention or purpose to charge any person connected with either the Interstate Commerce Commission or the intervenor, Seaboard Air Line Railway, with any improper personal conduct. We have the greatest respect for all parties concerned and involved. The use of such sharp and pointed terms as 'arbitrary and capricious,' railroad mindedness,' 'fraud,' and 'wilful' is confined to their legal concept.

"Within those sincere expressions of personal esteem, we present our argument." (R. 230, 231).

The following is a quotation from the transcript of argument before the District Court:

"Judge Dobie: I will say one thing for your brief; you will never be accused of handling the Interstate Commerce Commission with gloves.

"Mr. Beall: I have great respect for the Interstate Commerce Commission. As a commission I think it is one of the best the country has ever had as individuals. As a Commission I think they go wrong like everybody else does.

"Judge Dobie: 'Even the worthy Homer sometimes nods.'" (R. 1230).

CONCLUSION

Law

There are no provisions in the Interstate Commerce Act under which the Commission can authorize railroads, *as such*, to operate trucks under any circumstances whatever.

When Congress wanted railroads, *as such*, to operate trucks, it specified the circumstances, conditions and territory, in the Act, and left nothing for administrative determination by the Commission. (Sec. 202(c)(1)(2).) The discretion of the Commission is limited, under Sec. 207, to certificating motor carrier operations.

Congress defined the persons to whom certificates may be granted and limited such grants accordingly (Sec. 203 (a)(5)).

Only motor carriers may receive certificates.

Congress did not foreclose railroads from becoming the owners of motor carrier operations.

As a certificate may be issued only to a motor carrier, it follows that a railroad must, for the purposes of the proposed operations, assume the status of a motor carrier.

But a railroad as such, can never receive a certificate.

A railroad can never conduct railroad operations under a motor carrier certificate.

Nor can the Commission create and certificate a hybrid operation, part rail and part motor.

The Commission must administer and enforce all of the provisions of the Act and it may not waive or suspend any of them (Sec. 204(a)(6)).

Having assumed the status of a motor carrier it follows that all provisions of the Act are applicable.

It is in the light of these statutory requirements that the Commission's administrative actions are to be reviewed.

What does the Commission do when railroads apply for certificates?

1. It receives the application from the railroad, as such.

2. It conducts a hearing for the railroad, as such.

3. It considers railroad evidence, as such.

4. It views the prospective improvements in railroad service, as such.

5. It considers prospective railroad economies, as such.

Then it issues a certificate to the railroad, as such, to operate trucks.

It waives or sets aside the tariff provisions of the Motor Carrier Act and authorize the railroads to operate trucks under railroad tariffs.

It waives or sets aside the accounting provisions of the Motor Carrier Act and authorizes railroads, as such, to intermingle the truck revenues and expenses with the railroad revenues and expenses.

Those are the simple and undisputed facts with respect to the handling of these applications.

Those facts measured against the statutory provisions, in and of themselves show that the Commission has misconceived its jurisdiction and power.

Policy

In the course of the Commission's handling of railroad applications for certificates, the Commission refuses to consider every inquiry which normally arises in connection with motor carrier applications for motor carrier certificates.

The adequacy of existing motor carrier service is disregarded.

In fact, its existence is ignored by both the Commission and the railroad applicants.

When protestants are able to get that information into the record, the Commission generally concedes that an abundance of motor carrier service is available.

The willingness and ability of existing motor carrier to coordinate their service with the railroads are disregarded by both the railroads and the Commission.

The railroads state and the Commission finds, that railroads will not cooperate with independent motor cariers and for that reason *alone* the Commission issues certificates which the railroads apply for.

We do not question the fact that the Commission has broad powers to make determinations with respect to public convenience and necessity, but we do say that the broader

the power, the greater the necessity for the observance of statutory standards.

In railroad application cases the Commission has never conducted an investigation to determine the adequacy of existing motor carrier service.

The Commission has never conducted an investigation to determine whether any or all of the improvements to railroad service, and economies in railroad operations could be accomplished by cooperation with independent motor carriers.

The Commission has never conducted an investigation to determine whether the operations proposed by the railroads would result in destructive competition or restraint of competition.

When motor carriers contended that they could cooperate with the railroads and effect all of the improvements in service and economies which the railroads deemed desirable, the Commission dismissed their contentions with the observation that the railroads refused to deal wtih independent motor carriers.

In this case (Seaboard applications) the Commission failed and refused to accord protestants a hearing wherein they might show the destructive competitive practices and restraints of competition which would result from the granting of the applications.

The Commission dismissed these contentions with the bare and unsupported statement that it did not believe that protestants would be injured.

The procedure followed and the conclusions reached by the Commission can only be explained on the basis of the policy which the Commission has adopted.

Before the enactment of the Motor Carrier Act, the Commission made investigations and reports dealing with

the benefits which would accrue to railroads if they operated trucks to supplement their rail service.

The Commission found that if railroads operated trucks they could give their railroad patrons better railroad service.

The Commission found that if railroads operated trucks in connection with their railroad service they could effect many economies in railroad operations.

It is upon these findings and conclusions that the Commission adopts the policy of encouraging railroads to operate trucks.

The findings and conclusions of the Commission, made prior to the enactment of the Motor Carrier Act, have no application here. The national transportation policy directs the Commission to administer all of the provisions of the Act, with the view of carrying out a policy which the Commission did not have before it, when it made its prior investigations and reports.

Our contention is, that upon the passage of the Motor Carrier Act, a railroad *as such*, cannot be granted a certificate under the Motor Carrier Act, to conduct railroad operations under the Railroad Act.

Prior to the Motor Carrier Act the railroads could and many railroads did, inaugurate truck service in both terminal service and line-haul movements; and this was done without the necessity for certificates of any kind.

This Court had occasion to consider such line-haul truck operations on behalf of railroads in the *Thompson* case.[97]

That case did not involve public convenience and necessity, because the rights arose under the "grandfather" clause of the Motor Carrier Act.

That case discussed shipments by truck under railroad tariffs and bills of lading, but those discussions were mere-

[97] *Thompson* v. *U. S.*, ... U. S. ....., 88 L. ed. 326.

ly descriptive of what the railroad had done prior to the passage of the Motor Carrier Act.

Nothing in that case lends even color, to the contention that after the passage of the Motor Carrier Act, the railroad could operate a Motor Carrier Act certificate as a railroad and under railroad tariffs and accounting.

All this Court did in that case was to hold that by virtue of the "grandfather" clause the railroad became the possessor of a motor carrier certificate by virtue of the "grandfather" clause.

This Court left untouched the question as to whether the motor carrier certificate was to be operated by a railroad *as such* under the Railroad Act or was to be operated as a motor carrier under the Motor Carrier Act.

Legislative History

In the original Motor Carrier Act of 1935 (Sec. 203(a)(14)) Congress exempted from that Act such truck operations by railroads as were subject to the rail section of the Interstate Commerce Act.

Congress provided that all other truck operations by railroads, should be regulated as motor carrier operations.

Congress did not define the operations which were deemed to be subject to the Rail Act.

The Commission had repeatedly held both before and after the passage of the Motor Carrier Act that it had jurisdiction over pick-up and delivery service by railroads within terminal areas.[96]

In 1940, Congress amended the Motor Carrier Act by rewriting Sec. 203(a(14) (definition of common carrier by motor vehicle) and by adding Secs. 202(c)(1) and (2) (exempting-pickup and delivery service in terminal areas).

[96] Pick-Up and Delivery, 218 I. C. C. 441.

By adding Sec. 202(c)(1) and (2), Congress gave statutory recognition to the administrative rulings of the Commission, asserting jurisdiction over pick-up and delivery service and made that service subject to Part I.

Having stated under new Secs. 202(c)(1) and (2), the truck operations which were to be subject to the Rail Act and having exhausted the exemptions contemplated, Congress struck from Sec. 203(a)(14) all reference to truck operations by railroads.

Congress left in Sec. 203(a)(14) a reference to the Railway Express Agency and continued an exemption for such portions of its truck operations as were subject to Part I.

It should be noted that Sec. 203(a)(14) as originally written in 1935, exempted truck operations by railroad and express companies subject to Part I, without specifying how or when they became subject to Part I.

When Congress amended the Act of 1940 and eliminated all reference to railroads from Sec. 203(a)(14) but left express companies in, it further provided that the exemption applied to truck operations which have "heretofore been subject to Part I".

By inserting the provision "heretofore" Congress evidenced an intention to take from the Commission all jurisdiction to enlarge the exemptions by future administrative rulings.

We contend that by rewriting Sec. 203(a)(14) and adding Sec. 202(c)(1) and (2), in 1940, Congress merely made clear what it had intended, in 1935.

We contend that this legislative record supports our position, that the only truck operations which a railroad may conduct *as such* are those covered by Sec. 202(c)(1) and (2), and that all other motor carrier operations must

be conducted wholly within the provisions of the Motor Carrier Act.

Since 1940 the Commission has continued to grant certificates to railroads, upon applications under Sec. 207 of the Motor Carrier Act, and have also continued to exempt those operations from the tariff and accounting provisions of the Motor Carrier Act.

By so doing, the Commission has created a hybrid operation for which there is no statutory authority.

Theory of Hybrid Operations

The Commission calls these hybrid operations, part rail and part motor, a new kind of service.

Having called it a new kind of service the Commission proceeds to issue certificates under new kinds of proof of public convenience and necessity.

Having called it a new kind of service, unlike either rail service or motor carrier service, the Commission proceeds to issue a certificate under the Motor Carrier Act, and to prescribe tariff and accounting regulations under the Rail Act.

That the service is different from either rail or motor operations we do not dispute, but where does the Commission find statutory authority to recognize a new type of service which Congress has not recognized?

Where does the Commission find statutory authority to fashion a code of regulations by borrowing from both the Motor Carrier Act and the Rail Act?

The reports of the Commission make it clear, that it has issued the certificates on a showing of railroad convenience, railroad economies and improvements to railroad service.

The Commission concedes that it has not required a showing of public convenience and necessity for motor carrier operations under the Motor Carrier Act, such as is required of indepedent motor carriers.

The legislative history of certificates of convenience and necessity, under both the Rail and Motor Carrier Acts, show that the purpose of such certificates has been to prevent excess transportation, the cost of which must be borne by the public.

Numerous decisions by this Court have approved that principle.

Under the theory of a new type of service, the Commission has thrown to the winds all of the normal criteria for determining public convenience and necessity.

In the same reports it finds an abundance of motor carrier service but authorizes more.

Taking a pragmatic view of the situation, we pose the inquiry—How much additional transportation does this new type of service lead to?

There are 250,000 miles of railroads in the United States Under the railroad program, and under the Commission's policy every mile may be duplicated by a railroad operated truck line.

Between many important places there are from 2 to 5 paralleling railroads.

Under the railroad program and the Commission's policy, each railroad will be entitled to inaugurate its own truck service.

In addition to the 250,000 miles of railroad, there are approximately the same number of miles of operations by the railroad owned Railway Express Agency.

Under the Express Agency program and the Commission's policy, every mile of Express Agency operations

may be paralleled by truck operations conducted by the Express Agency.

In the face of this pyramiding of transportation service, the Commission, without making an investigation, merely observes that it does not believe that independent motor carriers will be injured by the new service.

The appendix hereto contains a partial list of reports authorizing truck operations by railroads.

No attempt has been made to list the several hundred reports granting rights to the Railway Express Agency.

Inherent Advantages

The Commission points out that truck operations have certain inherent advantages over rail operations.

For that reason the Commission finds that as to some services, railroads offer an inferior service.

Then the Commission concludes that Congress never intended that any type of transportation had a right to insist, that any other type of transportation must be limited to an inferior service.

Upon that premise the Commission grants certificates to railroads to operate trucks.

Every type of transportation has some inherent advantage over every other type of transportation.

Under the Commission's theory, every type of transportation would be authorized to inaugurate some services which are conducted by every other type of transportation.

Every transportation system would be duplicated to some extent, by every other type of transportation.

The Commission may feel that the railroads are the only ones entitled to operate motor carriers, water car-

riers, air lines, and express companies, but Congress has not taken that view.

The legislative history of transportation acts disclose that Congress had laid down a policy which is clearly at variance with that which is being fostered by the Commission.

The national transportation policy and the separate parts of the Interstate Commerce Act, together with other acts, recognize the separate types of transportation.

It certainly was not the intent of Congress that each of these types should invade the field of every other type.

Neither can it be said that Congress intended that any transportation agency should be permitted to obtain monopolistic control of other agencies.

Congress, long ago, put restrictions on the railroad ownership and operation of boats.

It did that in the Panama Canal Act.

Subsequently Congress put restrictions on railroad control of barge lines.

Separate administrative bodies were created for the regulation of air lines and foreign commerce by boat lines.

There is nothing to be found in the acts of Congress which lends any support to an integrated transportation monopoly.

The Commission cannot circumvent the will of Congress by creating new types of service, part one type of carrier and part another type of carrier, and borrow from the various regulatory provisions, and fashion a code of regulations to cover its creation.

The policy of the Commission caused the Department of Justice to intervene in the proceeding before the Commission, and cause it to answer this suit and confess error

and pray judgment for the defendants below, appellants here.

Comments By The Commission

In the reports of the Commission and in the briefs before this Court, there are a number of comments which have a tendency to minimize the importance and significance of what the Commission has done.

The Commission comments that the railroads will use the certificates to handle less-carload shipments by truck.

There are no provisions in the certificates which limit the shipments to less-carload traffic.

The railroad applicants stated on the record that they proposed to handle both carload and less-carload traffic.

The Commission refers to service which is "auxiliary to or supplemental of rail service".

At one time the Commission defined such service as involving shipments having a prior or subsequent movement by rail, but later abolished that test.

The Commission assures this Court that it limits the service to points served by the railroad.

But what important points are not served by railroads?

To the contention that the Commission limits this new service to that which is auxiliary or supplemental to rail service, the recorded facts supply the answer. The Commission has authorized railroads to abandon lines and to inaugurate motor carrier service between points formerly covered by the abandoned lines. This has done so in the face of service already being rendered by 50 truck lines between the terminal cities and including all intermdiate stations.[98]

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[98] Indiana R. Receiver—Abandonment, 240 I. C. C. 359.
Indiana R. Co.—extension 27 M. C. C. 176.

The Commission says that "key point" restrictions have the effect of limiting the service to that which is "auxiliary or supplemental". Key points are a new name for railroad terminals.

The certificates authorize the handling of traffic which never moves by railroad and it is difficult to see wherein such transportation is auxiliary or supplemental.

The key points may be hundreds of miles apart and are designated by the railroad and changed from time to time.

The Commission never made an investigation of its own to determine appropriate key points—railroads determine key points.

The Commission lays great stress on the conditions which it imposes.

The Commission assigned these applications for hearing while it still construed "auxiliary" or "supplemental," as requiring a prior or subsequent movement by rail, and the hearings were conducted on that basis.

Subsequently and without a hearing, the Commission abolished the prior or subsequent movement by rail condition.

Then the Commission without a hearing, provided some key point restrictions.

The railroads being dissatisfied with the key point restrictions which the Commission had suggested without a hearing, the Commission set all of the applications down for further hearing, with respect to the railroad's desires as to key points.

When the Commission issued its order setting the matter down for further hearing, it wrote into the order a provision limiting the hearing to the key point questions.

At the hearing the examiner ruled that this limitation in the order foreclosed protestants from developing any

matters having to do with public convenience and necessity. The Commission sustained the examiner.

The hearings were held on the theory that the separate applications would be operated as separate segments or routes and under a prior or subsequent movements by rail restriction.

But subsequently and without further hearings the Commission issued certificates for consolidated operations and abolished the conditions under which the hearings were held.

Appellants say that they were and are entitled to be heard regardless of whether the conditions which the Commission imposes or removes from time to time, are good, bad or indifferent, or benevolent.

The Commission has refused to hear them and for that reason, among others, we contend that such conditions as the Commission may or may not write into the railroad certificates, from time to time, are entirely beside the point insofar as the legal issues before this Court are concerned.

The Court will recognize the terms "auxiliary and supplemental" as having no precise definitions.

Congress did not use these terms but used the term "incidental" (Sec. 202(c)(1)) and limited its application to services within terminal areas.

We submit that Congress has not delegated to the Commission authority to write into the Act the terms "auxiliary and supplemental", apply them to line-haul operation, and change their meaning from time to time, without hearing.

The Commission lays great stress on what it contends are safeguards to protect the independent trucking industry.

As late as December 23, 1943[99], in discussing "auxiliary and supplemental" service, the Commission said:

> "Although, at times, a condition formerly was sometimes included in acquisition cases to the effect that service to be rendered should be 'auxiliary and supplementary' to the railroad's service, there has been no indication in the reports that such condition was intended to prohibit rendition of all motor-carrier service directly for the shipping public under the operating rights in *addition to*, in *substitution for*, and in *lieu of*, the parent railroad's service, or to restrict the operation solely to one in combination with the railroad's operation; nor is it our understanding that it has been so construed by the carriers. In other words, evidence upon which affirmative action has often been based, and the finding made that the resulting service would be auxiliary and supplementary to that of the railroad, has been based upon a motor-carrier operation in *addition to*, in *substitution for*, and in *lieu of*, the railroad's operation, as well as upon an operation *in combination* with the railroad."

The Commission has generally refused railroads authority to conduct operations into territories served by other railroads[100].

But the Commission fixes truck rates for the competing service which is "auxiliary or supplemental" and no longer restricts railroads to serving points which are served by the applicant railroad.

The most that the Commission does is to restrict railroads to the general territory served by the railroad.[101]

As late as February 14, 1945[102] a proposed report contained the following:

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[99] Sou. Pacific Co.—Control—Valley Motor Lines, 39 M. C. C. 441.

[100] Pa. Truck Lines—Control—Barker, 5 M. C. C. 11.

[101] Utah Idaho Central R. Co.—Control—Messinger, 39 M. C. C. 25 and cases cited at page 28.

[102] Frisco Transportation Co.—Control—Mo. Ark. Transportation Co., Docket MC-F 2529.

"assuming that railraods may acquire motor carrier properties within their own territories, such properties would become parts of the railroads' general operations and, as the word 'service' usually embraces the entire product of their business, there is grave doubt whether vendee would be performing any 'service by motor vehicle' whatever if it should be restricted to the mere use of motor trucks in lieu of freight cars in handling the railroad's freight only, at railroad billing and rates.

"Railroads could hardly be expected to resort to Section 5 proceedings for the purpose of acquiring such restricted rights, and if Congress desired to exclude them from performing a 'service by motor vehicle', it certainly would have used clear and definite language not now contained in Section 5 or in the national transportation policy (enunciated by Congress) to accomplish that result."

These quotations and citations destroy the arguments here made, by the Commission, to the effect that it limits railroad service to that which is "auxiliary or supplemental", or in any manner protects the independent motor carrier industry.

The Commission has authorized railroads to operate trucks and transport commodities with respect to which no railroad service is performed.

It has authorized the railroads to originate or terminate shipments by truck which move to and from every point on the Seaboard railroad in, six states.

Under the Seaboard's through routes and joint rates with other railroads, it may originate or terminate shipments by truck to and from every point in the United States.

All of this transportation may be performed under railroad rates, tariffs and bills of lading and accounting.

The Commission has authorized a system of through routes between railroad's truck operations and its rail operations, and with every other railroad in the United States.

The Commission has enabled the Seaboard Railway to do with its own truck operations, what the railroad refused to do in cooperation with independent truck lines.

In conducting these operations under railroad tariffs, the inherent advantages of the two types of transportation are totally disregarded.

The railroad may handle traffic by truck under railroad quantities and railroad costs, without separate accounting.

But the Commission fixes truck rates fo rthe competing independent motor carriers on the basis of truck costs and quantities.

This Court had occasion to consider this discriminatory policy of the Commission in the *Eastern-Central* case.[103]

Instead of perscribing conditions to protect the independent trucking industry, as the Commission's reports and briefs would suggest, it has discriminated against independent motor carriers and enabled railroads to engage in the most destructive of competitive practices.

Some divisions of the Commission have, on occasion, recognized the necessity for keeping separate the rail and motor accounts.[104] The Commission said:

> "At the hearing, counsel stated that the railroad has no objection to merger of the properties of Messinger with its own. However, we perceive little advantage to be gained from such a merger, and, on the contrary, the physical merger of the motor-carrier with railroad operations often results in accounting and record-keep-

[103] *Eastern-Central Motor Carriers Assn.* v. *U. S.*, ... U. S. ....., 88 L. ed. 431.

[104] The Utah Idaho Central Railroad Corp.—Control—Messinger Truck Line, Inc., 39 M. C. C. 25.

ing difficulties as well as complications in complying with the respective requirements of parts I and II of the act, which matters can be simplified by keeping the two types of operation separate. Our findings accordingly will authorize acquisition of control of Messinger as a separate operating entity."

Coordination

By separate parts of the Interstate Commerce Act, Congress has regulated the separate transportation agencies.

The national transportation policy, laid down the rule under which these sections were to be administered.

This Court had occasion to consider the national transportation policy in the recent *Seatrain* case,[105] decided January 29, 1945.

The Commission has never conducted an investigation to determine what improvements in railroad service and what economies in railroad operations, might result from cooperation with the independent truck lines.

That such cooperation is practical has been demonstrated over a long period of years.

The Commission's reports are replete with recitals of such arrangements,[106] and this Court has had occasion to discuss those arrangements.[107]

The railroad tariffs show that such arrangements have in effect with hundreds of independent motor carriers.[108]

The Assocoation of American Railroads passed a resolution forbidding its members from entering into joint rates with independent motor carriers.

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[105] *U. S.* v. *Pennsylvania Railroad Co.*, ... U. S. .....; 89 L. ed. 428.

[106] Missouri Pacific R. R. Co., application, 22 M. C. C. 321.
Chicago and N. W. R. Co., application, 31 M. C. C. 299.
Chicago M. & St. P. & P. R. R. Co., application, 41 M. C. C. 689.

[107] *Thompson* v. *U. S.*, ... U. S. ....., 88 L. ed. 326.

[108] National Substituted Freight Service Directory No. 1D I. C. C. A 3503, I. C. C. A 150—Agent L. E. Kipp and supplements thereto.

The Department of Justice proceeded against them under the Anti-trust laws and a permanent injunction was entered against the association and its members, including the Seaboard Airline Railway.

The railroads now tell the Commission that they want their own operating authority.

They assign as reasons "single responsibility to shippers"; "disclosure of shipper information"; "short-hauling themselves"; "arrangement with numerous motor carriers", etc.

There are about a thousand railroads in the United States but long ago Congress required them to establish through routes and joint rates between themselves and with water carriers.

It has not been shown that there is any difference between cooperation with independent motor carriers, subject to Interstate Commerce Commission regulation, and cooperation between railroads and water carriers, and those arguments were exhausted long ago.

One further argument remains and that is that the Commission is said not to have any power to require through routes and joint rates between rail lines and motor carriers.

But railroads have made hundreds of joint arrangements with independent motor carriers, and they make joint rates with railroad controlled motor carriers.

The issue therefore does not concern the Commission's power to require joint rates but concerns the Commission's power to prevent discriminations. It concerns the Commission's power and duty to refuse certificates to those who refuse to abide by the national transportation policy.

The Act is not silent on the matter of joint rates, as Sec. 216(c) specifically authorizes joint rates and Sec.

216(e) specifically gives the Commission jurisdiction to prescribe divisions of joint rates.

A careful analysis of the Commission's reports in these cases leads to but one conclusion, that certificates are granted to the railroads as such, because they refuse to cooperate with independent motor carriers.

In adopting this position the Commission is not only ignoring the national transportation policy but it is aiding the railroads in circumventing the Anti-trust laws.

It is difficult to understand how the railroads could hope to establish a fictitious showing of public convenience and necessity by the simple expedient of refusal to cooperate with independent carriers.

Why an expert body like the Interstate Commerce Commission should accept failure to cooperate, as proof of public convenience and necessity, is simply beyond comprehension.

Congress did not close the door to railroad operation of motor carriers but simply provided that when they do operate motor carriers, they should abide by the same regulations that independent motor carriers are required to observe.

Our contention is that railroads must meet the same proof of public convenience and necessity when they wish to inaugurate a motor carrier operation as any other motor carrier must meet.

They must conduct motor carrier operations under motor carrier tariffs and keep motor carrier accounts of their motor carrier operations.

The Commission has never made an investigation of the possibilities of coordination with independent motor carriers.

It accepted the railroad's declaration that they refused to cooperate, as disposing of all of the issues.

The Commission has never conducted an investigation to determine whether cooperation by the railroads and motor carriers, involve problems any different from those presented by cooperation between railroads and between railroads and water carriers.

The Commission has never made an investigation to determine what motor carriers are in a position to give system-wide cooperation with railroad systems.

Many motor carrier operations cover as much territory and frequently more, than most railroads.

There is a great inconsistentcy between the railroad's contention that they only desire to use trucks for short-hauls and their contention that they would be forced to deal with numerous motor carriers. If that problem arose at all, it could only arise in connection with long hauls.

Examination of the Commission's reports discloses that generally there are from one to fifty motor carriers operating over the routes which the railroads propose to operate.

We have contended that the Commission issued certificates on the basis of its policy and not on proof of public convenience and necessity.

If Congress intended that operating authority be granted on the basis of policy, there is no need for the Commission conducting a series of proceedings which are in effect ex parte.

Congress could have put a suitable provision in the law to cover that situation, the same as it did with respect to pick-up and delivery service in terminal areas.

But Congress provided for the issuance of certificates upon proof of public convenience and necessity, and re-

quired the Commission to conduct hearings and to make such findings.

Obviously such procedure involves hearings and the consideration of evidence.

Now we come to the simple question,—are there any conceivable motor carrier circumstances under which a railroad application might be denied?

An examination of the Commission's report and its reasoning discloses the answer and it is - no.

Findings Required

Sec. 207(a) requires an applicant to prove that public convenience and necessity requires the proposed service and the Commission must so find.

When a railroad purchases a motor carrier the Commission must find under Sec. 5(h), that the acquisition will not restrain competition.

The national transportation policy refers to unfair and destructive competition.

There is nothing in the certificate section (Sec. 207(a)) which refers to restraint of competition, however no joint arrangements may be made under Sec. 207(a) without approval under Sec. 5(1).

In a sense, the Commission has recognized that Congress did not close the back door against destructive competition by Sec. 5(b) and leave the front door open in Sec. 207.

most, if not all, of its reports the Commission has said (not found) that it does not believe that independent motor carriers will be injured.

The Commission has never conducted an investigation to determine what the facts might be.

The Commission has never determined or estimated the amount of traffic that might be diverted or the amount of revenue which might be lost to independent motor carriers.

The mere expression of belief in an evidentiary vacuum does not meet the statutory requirements for findings.

In this case, the procedure followed by the Commission foreclosed the development of evidence which would have disclosed the facts.

Hearings

As disclosed by the record and the opinion below appellant protested that they had been denied a fair and reasonable hearing from the beginning of these proceedings.

Initially, the gist of the complaint lay in the fact that the railroad split its routes up into a number of segments, filed separate applications for each segment and the Commission conducted separate hearings by joint boards on each segment.

This resulted in protestants being unable to show the manner in which they would be harmed, by the aggregate of routes or segments applied for and neither could they show the manner in which they would be able to coordinate their services with the railroad.

Upon it being disclosed that the railroad proposed to conduct through operations, protestants petitioned the Commission to consolidate the applications and conduct the hearings itself in order that the full facts might be developed.

This the Commission refused to do.

Later on upon petition of the railroad, the Commission did consolidate all of the applications and conducted a hearing itself for the purpose of revising the key point restrictions in accordance with the request of the railroad.

When this was done protestants thought they would be able to present their evidence and the Commission would be in a position to understand and appraise the scope of the entire operation.

But the Commission restricted the hearings so as to prevent protestants from developing any issues touching on public convenience and necessity or any other issue other than the railroad program relating to key points.

This situation has been briefed here and was developed fully before the Court below.

It is dealt with in Judge Paul's dissent.

At no time has the Commission ever held a hearing on these applications which covered the operations actually authorized.

At no time did the Commission ever hold a hearing on these applications in the light of what the Commission deems to be service auxiliary or supplemental to railroad service.

Throughout six years of continuous proceedings, appellants were repeatedly denied an opportunity to show their ability to serve the public and they were also denied an opportunity to show in what manner they would be injured by the operations which the railroad proposed to conduct.

———o———

It is for those reasons that appellants contend that they have been denied a fair and reasonable hearing.

The Commission's orders should be set aside because:

It has exceeded it jurisdiction and adopted a policy which only Congress can adopt.

It has not conducted proper hearings.

It has failed to make proper findings.

Respectfully

J. Ninian Beall
Roland Rice
Attorneys for Appellants

APPENDIX

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APPENDIX

Railroads.

CONGRESSIONAL RECORD VOL. 79.

Mr. Wheeler:

"Subsection (a) contains a comprehensive declaration of policy. As amended, it makes clear that the policy of Congress is to deal fairly and impartially with transportation by motor carriers and to preserve the natural advantages of such transportation.

"There was a fear upon the part of some of the bus and truck operators at first that if they were brought under the Interstate Commerce Commission they would not be dealt fairly with, and that their rates would be raised so as to make it possible for the railroads to get the business now carried on by them, but we specifically wrote into the bill, in the declaration of policy provision, and at other places throughout the bill, that the peculiar features of transportation by truck and by bus should be taken into consideration at all times by the Interstate Commerce Commission, and we put such a provision in the declaration of policy.

"The exercise of authority by the Commission under certain sections of the bill is directly related to the declaration of policy and the added provisions with respect to discrimination, preference, and unfair or destructive competitive practices lay a stronger and more definite basis for administrative action." (C. R. 5877).

* * *

Mr. Wheeler:

"The bill was drafted originally by Coordinator Eastman and approved by the Interstate Commerce Commission, which transmitted it to Congress. When it came to the committee and after the hearings, the committee took up the bill and spent every morning on it for perhaps a week and went over it in conjunction with Coordinator Eastman, and amended it and liberalized it as we felt it should be." (C. R. 5878).

* * *

Mr. Wheeler:

"This addition will check the filing of complaints where the purpose is solely that of harassing or crippling motor carriers.

"It was urged that some of the railroads might come in and file objections and try to harass the where there was not a valid reason stated the commission of its own motion might dismiss the complaint, if one person was merely seeking to harass another." (C. R. 4879).

* * *

Mr. Wheeler:

* * *

"Paragraph (d), on page 44, prohibits unjust discrimination or undue prejudice or disadvantage. The committee has added a provision that this prohibition shall not be construed to apply to the traffic of any other carrier of whatever description.

"In other words, some of the truck and bus operators were afraid that the railroads would come in and complain, and we added this provision so as doubly to protect the truck and bus operators." (C. R. 5882, 3).

Mr. Wheeler:

"As I see it, practically all the criticisms that have been made against the bill have been made on the theory that the Commission was not going to carry out the policies laid down by the measure. There has been a fear upon the part of some people—in my judgment, an unfounded fear—if the administration of this bill were turned over to the Interstate Commerce Commission, that Commission might regulate bus and truck transportation in the interest of the railroads and not in the interest of the general public, and that it might not give bus and truck operators a fair deal. It is fair to say to the Senate that the American Trucking Associations, Inc., and likewise the water carriers of the country, have insisted that the Commission should be reorganized and that a bill should be pased reorganizing the Commission if the

truck bill and the water-carrier bill should pass, so as to set up in the Interstate Commerce Commission a special division for the handling of each particular kind of transportation. Coordinator Eastman has made recommendation to that effect, and I wish to say to the Senate that I have promised both the water carriers, if their water-carrier bill shall pass, and likewise the bus and truck interests, that I would try to have passed a bill in accordance with the recommendations of Coordinator Eastman." (C. R. 5883).

* * *

"Mr. Dickson. Mr. President, I should like to inquire of the Senator from Montana whether he is familiar with the objections filed by the various farm organizations to this bill, setting forth five reasons for their opposition, and, if so, I should further like to ask him whether or not the bill has been amended to cover any of these objections which have been made?

"Mr. Wheeler. Mr. President, I will say to the Senator that I appreciate the fact that some of the farm organizations have filed protests against the bill. Mostly, however, they have been based on the theory that they were afraid the Interstate Commerce Commission was not going to regulate the busses and trucks as a separate institution; but we have exempted the casual or reciprocal transportation by the farmers from the operation of the bill should it become a law. In other words, any farmer who engages in casual trucking operations, say, from his farm to Des Moines, Iowa, for the purpose of carrying his products and his neighbor's products, is within the exemption.

"There has been propaganda by some who do not want any regulation to the effect that this bill would cause an increase of rates up to the standard of the railroad rates. That contention is not based upon any fact, but is based upon pure propaganda, in my judgment, and is without foundation.

"Coordinator Eastman has suggested—and we have written the suggestion into this bill specifically—that bus and truck operations should be viewed by the Commission in the peculiar light of their particular

business, and that railroad rates should not be the yardstick for the rates which should be established for bus and truck operators." (C. R. 5952).

Mr. Sadowski:

"The bill provides as follows:

"Section 202 sets forth the declaration of policy and vests jurisdiction in the Interstate Commerce Commission. I want to say in this connection that in reporting out this bill your committee has no intent to undertake to suppress or restrict in any way the proper development of motor-carrier transportation by responsible carriers for the good of the public interest. Nor do we want motor-carrier transportation subservient to or restrained or curtailed by any other transportation medium. The purpose of the bill is to provide for regulation that will foster and develop sound economic conditions in the industry, together with other forms of public transportation, so that highway transportation will always progress." (C. R. 12684).

"Mr. Mitchell of Tennessee. There is an idea that the railroads may operate the bus lines throughout the country. What does the gentleman say to that?

"Mr. Mapes. I think under the regulations by the Interstate Commerce Commission there is not much danger of that. Let me say that the bill does not contemplate that the Commission, if it does fix the rates, will fix the same rates as the railroads charge, but will only fix such rates as are necessary to allow a reasonable return to those engaged in the transportation of passengers and freight in interstate commerce by motor vehicles. (Applause.)" (C. R. 12688).

"Mr. Crawford. Mr. Chairman, the gentleman from New York gave a most interesting discussion on this bill. I wish I could agree with all of it. There is a staggering problem involved in this bill. It is hardly necessary for me to say that. But the shippers of this country cannot do without contract- and common-carrier truck service. We have gone away beyond the day when we can do only with rail transportation in the United States. That is past history. I am positive

that the railroad employees and railroad executives will be highly disappointed as the result of this legislation; yet at the same time, as one who has participated in our State, to a fairly large extent, in the creation of trucking companies, in the creation of truck service and in the use of that service in sheer self-defense, in sheer desperation to find transportation service which the railroads could not render and did not render with the equipment they had at that time and which they could not render with the equipment and service which they extend at the present time, I have seen so much damage to the industrial activities through transportation by unregulated and unmanaged common carriers that, based on experience, I shall have to vote for this legislation. I do that as one who has used, to the extent of millions of tons, trucks for shipping purposes, as one who believes so thoroughly in truck transportation. Still I shall vote for this bill. I shall vote for the bill, realizing that at the moment we do not, in my opinion, have a national transportation problem; that at the present time, in my opinion, we have a railroad problem of the widest proportion. Tonnage has shifted to trucks, not through something that the railroads did, but as a result of something they did not do; that is, they failed to give service. That is why the trucks got it." (C. R. 12689).

"Mr. Fulmer. Is it not a fact that the railroads are largely responsible for inviting this competition because of the extremely high freight rates and passenger rates, and in some instances discriminatory rates, and largely because of extra rates on short hauls? Have not the railroads by these practices absolutely forced this type of competition?

"Mr. Crawford. The gentleman is correct." (C. R. 12690).

SECTION 213 (NOW SEC. 5(b)).
CONGRESSIONAL RECORD, VOL. 79.

Mr. Wheeler:

"Section 213, page 35. Consolidation, merger, and acquisition of control: At present most truck operations are small enterprises. However, there are many

rumors of plans for the merging of existing operations into sizeable systems. In view of past experience with railroad and public-utility unifications, it is regarded as necessary that the Commission have control over such developments, where the number of vehicles involved is sufficient to make the matter one of more than local importance. This section, therefore, confers on the Commission jurisdiction over all consolidations, mergers, purchases, leases, operating agreements, and acquisitions of control through stock ownership where two or more motor carriers are involved or where a person other than a motor carrier undertakes to acquire control through stock ownership of two or more motor carriers, and prohibits all other forms of unification. An amendment made by the committee makes this jurisdictional applicable, except in the case of rail, express, or water carrier affiliations, only where the total number of vehicles involved is more than 20 (sub-par. (e), p. 39).

"In other words, we eliminated from this provision such a case, for example, as that of two small operators who might want to get together, and we made it apply only to cases where they had more than 20 vehicles, so that the small operators could get together without the necessity of going through a great deal of red tape with the Commission.

"The language of paragraph (a) has been simplified without change in the intent of the original bill, except for a broadening of its scope with respect to contract carriers and operations effected by the substitution of the term 'persons' for the term 'corporation', as in line 11, page 36.

"Carriers by rail, express, or water are permitted to consolidate or merge with motor carriers or to obtain control in any of the ways indicated above, but only on a showing that 'the transaction proposed will promote the public interest and enable such a carrier other than a motor carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.' With this limitation, it will be possible for the Commission to allow

acquisitions which will make for coordinated or more economical service and at the same time to protect the public against the monopolization of highway carriage by rail, express, or other interests." (C. R. 5881, 2).

Mr. Sadowski:

"Section 213 provides that the Commission shall control the consolidation, merger, and acquisition of control of motor carriers. I will say in this respect that it is the intent, and it is important to the welfare and progress of the motor-carrier industry that the acquisition of control of the carriers be regulated by the Commission so that the control does not get into the hands of other competing forms of transportation, who might use the control as a means to strangle, curtail, or hinder progress in highway transportation for the benefit of the other competing transportation." (C. R. 12685).

Congress Notes I. C. C. Disregard of Statutory Mandates

The Commissions policy has had its repercussions in the Congressional debates.

In 1935 when the Motor Carrier Act was passed, motor carriers and many members of Congress were afraid of the Commission and put in numerous amendments which were designed to require the Commission to administer the Act fairly. Congress thought it had made it clear that the Commission was to recognize the motor carrier industry as an independent transportation system and not regulate it as a mere adjunct to the railroads.

In 1940, Congress further amended the Interstate Commerce Act and gave the Commission jurisdiction over water carriers. Again many members of Congress were fearful of the Commission.

The committee assured the members that their fears were unfounded.

Let us see what members of Congress now think of the manner in which it has "regulated" motor carriers and water carriers. In the Senate debates, July 1, 1943, 89 Congressional Record, pages 6908-6910, there was under discussion the refusal of the railroads to cooperate with water carriers, and we find the following:

"Mr. Shipstead. Recently the Supreme Court of the United States handed down a decision that is of a great interest to Members of the Congress in connection with legislation which was enacted to assure transportation on the inland waterways and to protect producers who had hoped to make use of the inland waterways in the handling of the transportation of freight.

"Congress passed what was called the Transportation Act of 1940. That act placed under the control of the Interstate Commerce Commission the regulation of rates by rail, and truck, and also by barges on the inland waterways. There was a great deal of opposition to that bill in 1940 because many legislators feared—and so stated on the floor of the Senate as well as of the House—that the inland waterway transportation would suffer under the domination and regulation of the Interstate Commerce Commission for the reason that the Commission was said at that time by many Senators and Members of the House to be a railroad-minded body. Assurances were given, however, and a section was written into the law directing the Interstate Commerce Commission, in the regulation of rates, to give the benefit to the inherent savings which could be made by the waterways in the arrangement of rates, and providing that the Commission should not discriminate against the waterways, but that inherent advantage of low-cost water transportation should be protected.

"Under such assurances from the sponsors of the legislation and because of amendments which were added, the bill finally passed."

• • •

"Mr. La Follette. It is my recollection that the debate in the Senate at least left the clear understanding in the minds of Senators, so expressed in the record, that no such thing could ever happen under the conference report on the bill which was adopted.

"Mr. Shipstead. I so understand, and that is why I am calling this matter to the attention of the Senate at this time.

"Mr. La Follette. Is it not the opinion of the Senator from Minnesota that if there had been any other construction placed upon it, the bill would have been defeated?"

* * * * *

"Mr. Clark of Missouri. The Senator will recall that when the bill which became the Transportation Act of 1940 under consideration in this body, some of us stood on this floor for 3 days—I know the Senator from Minnesota and the Senator from Wisconsin did, and I know I did, and I know of several other Senators who did—and pointed out specifically the construction likely to be put upon the law by railroad-minded Interstate Commerce Commissioners, if we passed the bill in its then shape. It was vehemently and specifically denied for 3 days on this floor that any such construction was possible. I remember the representative of the Interstate Commerce Commission sitting right here on the floor next to the Senator from Montana (Mr. Wheeler), the chairman of the Committee on Interstate Commerce, and supplying him with denials that it was even remotely possible that such a construction could be put on the act as has actually been put on it. In my judgment, the measure could not have been passed through this body, or through the Congress, and probably would not have been signed by the President, except for those vehement denials as to the possibility of any such construction.

"We charged then that what has happened would happen; that the Interstate Commerce Commission, a railroad-minded body, would deliberately start out to destroy all efforts at water transportation. The Senate saw fit to believe protestations which were

made against any possibility of such an occurrence, but what we predicted has unfortunately and lamentably come to pass."

• • •

"Mr. Wheeler. Let me say that we did provide in the bill, and it was my understanding, that transportation by water, by truck, and every other kind of transportation would be taken into consideration by the Interstate Commerce Commission. I am as much opposed to the ruling which the Interstate Commerce Commission has made with respect to this matter as is the Senator from Missouri.

"Mr. Clark of Missouri. I am very certain that is true, and I am glad the Senator from Montana made the statement, because that has been his position at all times.

"Mr. Wheeler. That was my position then, it is my position now. The ruling of the Interstate Commerce Commission and the ruling of the Supreme Court are both contrary to the construction which I have placed on the law and the construction which I told the Senate would be placed on the law.

"I wish to say that I wanted the regulation to be made by the Interstate Commerce Commission, because I thought that Commission would at all times provide for rates to be fixed according to the inherent advantages of the different forms of transportation. As the Senator from Minnesota (Mr. Shipstead) knows, we have been holding hearings for the past 2 months upon proposed legislation to regulate the traffic bureaus of the country. Representatives of the Department of Justice have been heard at great length on the matter, and so have representatives of th railroads. We have not as yet concluded the hearings. They will be taken up again at the conclusion of the recess of Congress. I am hopeful that the Interstate Commerce Commission will recognize the inherent advantage of different forms of transportation. I will say that I have been disappointed by some of the rulings made by the Commission in permitting truck and bus rates to be raised to the level of railroad freight rates.

"There is a concerted effort now being made to permit railroads to get into the truck and bus business. When Congress reconvenes after the recess I intend to introduce proposed legislation to prevent railroads from owning busses and trucks. I think the railroad business should be divorced from the bus and truck business. I think the express companies, which are owned by the railroads, should not be permitted to engage in the trucking business. I think the railroads should not be in the trucking business; I think the railroads should not be in the water transportation business, and I think they should not own air transportation facilities.

"I know the idea exists in the minds of many persons in this country that all forms of transportation should be owned by one group. If that ever happens we will have no competition in transportation in the United States. I shall oppose my such movement with all my strength."

• • •

"Mr. Clark of Missouri. I am very happy indeed to hear the statement made by the Senator from Montana. It seems to me that until such time as we come to a system of monopolistic control, under which a man could go to an office at Helena, Mont., or Bowling Green, Mo., or Madison, Wis., or Bismarck, N. Dak., or any place else, and ask one responsible official what was the cheapest way for him to transport a bill of goods from one point to any place on the habitable globe, and have it routed by the cheapest possible route, whether by air, by rail, or by water, or part water, and part air, and part rail—a sort of monopolistic control which would necessarily mean Government ownership, as I see it—I say, Mr. President, until we come to such a time as that there ought to be the completest competition and separation between these various forms of transportation."

The comments of Senator Wheeler are particularly important because he was Chairman of the Senate Committee on Interstate and Foreign Commerce when both the Motor

Carrier Act and the Water Carrier Act was passed and he is still Chairman of that Committee.

We are on sound ground when we charge the Interstate Commerce Commission with disregard of its statutory duties and the intent of Congress.

INDEX TO TESTIMONY BY ISSUES

Failure And Refusal To Hear And Consider Evidence With Respect To The Relation Of Each Sub Application To Other Subapplications, And Disregarded The Refusal Of The Railroad Applicant To Accept Or Agree To Any Restrictions On The Operations Of The Sub.

Error Involved: These matters involve the jurisdiction of the various substandard joint boards under Section 205, and disregard the issue of convenience and necessity under Section 207, and disregard restraint of competition under Section 5 (old Section 213).

Transcript—Before Joint Boards

Jurisdiction challenged—Sub (2) (4) (5) (6), R. 530; Sub (3), R. 287-289; Sub (7), R. 425-428; Sub (9) (10), R. 659, 660; Sub (18), R. 836, 837; Sub (19) 918, 919.

References to other applications were excluded—Sub (3), R. 314; Sub (7), R. 424, 466-468, 483, 484.

Evidence—competitive effect—excluded—Sub (7), R. 464-466.

Evidence—railroad policy—excluded—Sub (3), R. 304; Sub (7), R. 484-488.

Evidence—Railroad Express Agency—excluded—Sub (2) (4) (5) (6), R. 540, 541, 542, 574, 575.

Railroad unwilling to restrict subapplications—MC 86687 and Sub (1), R. 345, 346, 381-383; Sub (2) (4) (5) (6), R. 545, 569, 570; Sub (3), R. 310, 311; Sub (7), R. 464, 488, 489.

Railroad policy is to parallel their lines—Sub (7), R. 496.

Railroad—objection to key points—Sub (3), R. 260-262.

Through operations—disclaimer based on schedules—Sub (2) (4) (5) (6), R. 570; Sub (7), R. 432, 433, 498-500.

When the Commission consolidated the dockets and held a further hearing, it likewise and more emphatically rejected evidence.

Transcript—Before The Commission

Evidence—coordination—excluded—R. 1116, 1117, 1226-1228.

Evidence—traffic involved——excluded—R. 1106, 1107, 119, 1120, 1209, et seq.

Evidence—economies—excluded—R. 1167, 1168.

Evidence—rates—excluded—R. 1115, 1208, 1209.

Evidence—use of railroad employees—excluded—R. 1145, 1146.

Evidence—restrictions—excluded—R. 1132, 1134.

Evidence—keeping of records—excluded—R. 1115-1117.

The Commission Failed And Refused To Develop And Consider Evidence Bearing On Coordination With Independent Motor Carriers And Adequacy Of Existing Service.

Error Involved: Lack of findings of fact in connection with convenience and necessity under Section 207, and restraint of competition under Section 5 (old Section 213).

Transcript—Before Joint Boards

Railroad refused to consider—MC 86687 and Sub (1), R. 381, 382; Sub (2) (4) (5) (6), R. 554-557; Sub (3), R. 281-283; Sub (7), R. 443; Sub (18), R. 844-845.

Railroad—not familiar with existing service—MC 86687 and Sub (1), R. 340, 381, 382, 397; Sub (3), R. 278, 279, 283, 284; Sub (7), R. 457, 458; Sub (18), R. 873; Sub (19) 954, 955, 966 et seq.

Existing truck service adequate—MC 86687 and Sub (1), R. 403, 404, 413, 419; Sub (2) (4) (5) (6), R. 618 et seq; Sub (7), R. 505-520; Sub (19), R. 1026 et seq.

Transcript—Before The Commission

Evidence—coordination rejected—R. 1116, 1117, 1226-1228.

The Commission Considered Only Railroad Convenience As Distinguished From Public Convenience And Necessity.

Error Involved: Lack of findings of fact in connection with convenience and necessity under Section 207 and restraint of competition under Section 5 (old Section 213).

Transcript—Before Joint Boards

Applications considered as railroad operations—Sub (3) R. 301, 302; Sub (9), R. 771, 772; Sub (19), R. 928.

Train connections—principal purpose—Sub (3), R. 248; Sub (8), R. 791 et seq.

Change train service—day to night—MC 86687 and Sub (1), R. 335, 378; Sub (7), R. 478, 479.

Train schedules—involved crew difficulties—MC 86687 and Sub (1), R. 391, 392.

Train connections—frequently missed—Sub (8), R. 791 et seq.

Train crews—relieved of handling l.c.l.—MC 86687 and Sub (1), R. 375.

Train stops—elimination—MC 86687 and Sub (1), R. 339, 347, 348, 371, 372; Sub (3), R. 284; Sub (7), R. 477, 478.

Train movements—expedited——MC 86687 and Sub (1), R. 366, 367; Sub (2) (4) (5) (6), R. 537, 538, 584, 600, 601; Sub (3), R. 247, 248; Sub (8), R. 788, 789; Sub (9), R. 750; Sub (15), R. 816, 817; Sub (18), R. 840, 868.

Changes contemplated in train schedules—MC 86687 and Sub (1), R. 365-367; Sub (3), R. 252.

Will handle both truck-load and less truck-load—Sub (3), R. 262, 263.

L.C.L. freight to be reduced—Sub (2) (4) (5) (6), R. 545; Sub (19), R. 994, 995.

Convenient to railroad regardless of truck finances—Sub (7), R. 461, 462.

Truck operations based on railroad economies—MC 86687 and Sub (1), R. 339, 347, 348, 372, 373; Sub (2) (4) (5) (6), R. 604, 605; Sub (3), R. 254, 255; Sub (9) (10), R. 675, 676; Sub (15), R. 817, 818; Sub (18), R. 868, 869; Sub (19), R. 993.

Will be no savings in train operations—MC 86687 and Sub (1), R. 339.

No train curtailments contemplated—MC 86687 and Sub (1), R. 339, 390, 391; Sub (2) (4) (5) (6), R. 538, 603, 604; Sub (3), R. 253, 254; Sub (7), R. 486; Sub (15), R. 825, 826; Sub (18), R. 841; Sub (19), R. 994, 995.

Transcript—Before the Commission

No known basis for determining when substituted or auxiliary service would be used in lieu of rail service—R. 1103-1109, 1113, 1114, 1115, 1123.

Railroad will use both coordinated and substituted service—R. 1112, 1113.

Removal of key point restrictions—based on railroad convenience—R. 1121.

The Commission Failed And Refused To Determine And Consider The Amount Of Traffic Involved, The Prospective Revenues And Expenses, And The Offers Of Independent Carriers To Cooperate.

Error Involved: Lack of findings in connection with determination of convenience and necessity under Section 207 and restraint of competition under Section 5 (old Section 213).

Transcript—Before Joint Boards

Railroad has no information—traffic—way stations—Sub (3), R. 263-265.

Railroad—no revenue estimate on any basis—Sub (3), R. 285, 286.

Motor carriers offered to cooperate—MC 86687 and Sub (1) R. 399-402, 408-415; Sub (2) (4) (5) (6) R. 618-620, 648-650; Sub (7) R. 503, 504; Sub (19) R. 1037, 1038.

No difference in interchanging with motor carriers and interchanging with rail lines—Sub (7) R. 454-456.

Diversion of revenues—reason for not coordinating—Sub (2) (4) (5) (6) R. 555, 556; Sub (7) R. 450, 451.

Short haul—reason for not interchanging—Sub (2) (4) (5) (6) R. 637, 638; Sub (9) (10) R. 773, 774.

Supervision of employees—reason for not coordinating—Sub (7) R. 443, 444.

Disclosure of business—reason for not coordinating Sub (7) R. 443, 444.

Would not coordinate with independent carriers if all purposes were served—Sub (2) (4) (5) (6) R. 554, 555; Sub (9) (10) R. 730, 731.

Independent carriers only operating at 40 per cent of capacity—Sub (19), R. 1037, 1038.

Transcript—Before the Commission

Evidence—traffic—excluded—R. 1106, 1107.

No information re movements wholly by truck—R. 1119, 1120.

Tonnage could be given if required by the Interstate Commerce Commission—R. 1117, 1119.

Interstate and intrastate traffic could be determined if required by Interstate Commerce Commission—R. 1117-1120.

Volume of carload and less-car-load could be determined if required by Interstate Commerce Commission—R. 1119, 1120.

The Commission Failed And Refused To Determine And Consider Revenues And Expenses, Use Of Railroad Facilities And Employees, And Necessity For Separate Accounting.

Error Involved: Failure to make findings for certificates under Section 207, and finding with respect to restraint of competition Section 5 (old Section 213).

Transcript—Before Joint Boards

The financial results unknown—Sub (7), R. 462, 480, 481.

No overhead costs included in estimates—Sub (2) (4) (5) (6) R. 584, 585; Sub (7) R. 439, 459, 460, 462; Sub (15) R. 821-823; Sub (18) R. 891.

Costs and revenues are intermingled with Railroad figures—MC 86687 and Sub (1) R. 341, 342, 347; Sub (2) (4) (5) (6) R. 569, 572, 573; Sub (3) R. 301, 302; Sub (7) R. 452, 453, 472, 490, 491, 496; Sub (18) R. 842.

I. C. C. motor carrier accounting rules—unknown to railroad—MC 86687 and Sub (1) R. 347, 348.

Will use railroad agents—Sub (3) R. 255; Sub (7) R. 472.

Will use railroad stations—Sub (3) R. 255.

Will use railroad bills of lading—MC 86687 and Sub (1) R. 340, 341; Sub (3) R. 247, 248; Sub (19) R. 1020, 1021.

Accounts could be separated if required by Interstate Commerce Commission—Sub (7) R. 472, 473.

Railroad truck operations are losing money—Sub (19) R. 938.

Use of railroad facilities—reduced cost below independent carriers—Sub (7) R. 454.

Transcript—Before the Commission

Will use railroad rates—R. 1115.

Examination and expenses will be intermingled with railroad figures—R. 1110, 1115.

The Commission Failed And Refused To Develop And Consider That The Railroad Proposed To Take Traffic Away From The Independent Motor Carriers, And That The Railroads Had No Basis Whatever For Determining A Key Point Or Distribution Point, Or When Auxiliary Or Supplemental Service Would Be Substituted For Straight Rail Service.

Error Involved: These issues involve the failure to make findings which the Commission must make in determining convenience and necessity under Section 207, and the finding which the Commission must make with respect to restraint of competition under Section 5 (old Section 213).

Transcript—Before Joint Boards

Railroad expects to divert traffic from other carriers—Sub (3) R. 279, 280.

Railroad expects to regain business—MC 86687 and Sub (1) R. 380, 381; Sub (2) (4) (5) (6) R. 568, 569, 617, 618; Sub (7) R. 500, 501; Sub (8) R. 809, 810; Sub (18) R. 844, 845; Sub (19), R. 967, 968.

Railroad expects to get new business—MC 86687 and Sub (1) R. 379, 380; Sub (2) (4) (5) (6) R. 568, 569; Sub (15) R. 827.

Will be competitive with independent trucks—Sub (3) R. 255, 256.

Transcript—Before the Commission

Railroad has no data on costs and savings—R. 1157, 1158.

Railroad has no basis for determining when coordinated or substituted service could be used to advantage, or any basis for the establishment of key point restrictions other than railroad convenience—R. 1103-1109, 1112-1115, 1121, 1123.

STIPULATION NO. 2

It is stipulated and agreed by and between American Trucking Associations, Inc., Interstate Commerce Commission, and Legh R. Powell, Jr., and Henry W. Anderson,

Receivers of the properties of Seaboard Air Line Railway Company, that said Receivers, by timely action on their part, filed with the Interstate Commerce Commission, as a part of their tariffs publishing charges for the transportation of less-than-carload shipments by rail, a provision that the rates therein published shall apply to the transportation of less-than-carload shipments by motor vehicle in substitution for rail service wherever such substituted service is provided; that the points to and from which said substituted service is provided by said Receivers are designated in a tariff concurrently filed with the said Commission known as Kipp's National Substituted Freight Service Directory No. 1-D, I. C. C. No. A-3503, M. F.-I. C. C. No. A-150, and that said provisions in the rate tariffs and the said National Substituted Freight Service Directory were filed and published by the said Receivers as in accordance with the requirements prescribed by the Interstate Commerce Commission governing the filing of tariffs by motor carriers in Ex Parte 129, 232 I. C. C. 683.

It is further stipulated and agreed that said tariffs are applicable to the substitution of motor carrier service for rail carrier service for shipments receiving a prior or subsequent movement by rail as well as to shipments moving entirely by motor carrier service operated by said Receivers.

It is understood and agreed that nothing herein shall preclude the said American Trucking Association from contending that the said requirements of the Interstate Commerce Commission exceeded its powers under the Interstate Commerce Act or shall prevent the said Commission or the said Receivers from contending that the averments of the complaint herein respecting the failure and refusal of the said Commission to require the said Receivers to comply with Section 217 of the Interstate Commerce Act are not cognizable by the Court in this cause.

J. NINIAN BEALL,
Attorney for Plaintiffs,
DANIEL H. KUNKEL,
Attorney for Interstate Commerce Commission, Defendant.
W. R. C. COCKE,
THOMAS L. PRESTON,
CHAS. T. ABELES,
Attorneys for Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the properties of Seaboard Air Line Railway Company, Intervening Defendants.

IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Plaintiffs,

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
Defendants.

Civil Action No. 285.

STIPULATION NO. 3

It is stipulated and agreed by and between American Trucking Associations, Inc., Interstate Commerce Commission and Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the properties of Seaboard Air Line Railway Company, that upon petition by said Receivers to the Interstate Commerce Commission showing that the accounts maintained by said Receivers do not segregate the

revenues and expenses of their motor carrier operations from the revenues and expenses of their rail operations, a true and correct copy of which petition is attached hereto and made a part hereof, the said Commission by order issued pursuant to Section 220 of the Interstate Commerce Act, a true and correct copy of which is attached hereto and made a part hereof, authorized the said Receivers, in accordance with its general practice in such cases, to include in their reports required by said Commission of common carriers by railroad a statement of all revenues derived from and expenses incurred in their motor carrier operations, and to that extent relieved the said Receivers from reporting separately the revenues and expenses of their rail and motor carrier operations.

It is understood and agreed that nothing herein shall preclude the American Trucking Associations, Inc., from contending that the said order of the Interstate Commerce Commission exceeded its powers under the Interstate Commerce Act, or shall prevent the said Interstate Commerce Commission or the said Receivers from contending that the averments of the complaint herein respecting the failure and refusal of the Commission to require said Receivers to comply with Section 220 of the Interstate Commerce Act are not cognizable by the Court in this cause.

J. NINIAN BEALL,
Attorney for Plaintiffs,
DANIEL H. KUNKEL,
Attorney for Interstate Commerce Commission, Defendant,
W. R. COCKE,
THOMAS L. PRESTON,
CHAS. T. ABELES,
Attorneys for Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the properties of Seaboard Air Line Railway Company, Intervening Defendants.

SEABOARD AIR LINE RAILWAY

L. R. Powell, Jr., and Henry W. Anderson,
Receivers.

FINANCE AND ACCOUNTING

R. Parke Jones,
Chief Finance and Accounting Officer.

Norfolk, Va., January 19, 1938.
5257, 5817, 5898.

Mr. W. P. Bartel, Secretary,
Interstate Commerce Commission,
Washington, D. C.

Dear Sir:—

Reference is made to order of the Interstate Commerce Commission, dated November 29, 1937, prescribing, effective January 1, 1938, a Uniform System of Accounts for Class I Common and Contract Motor Carriers of Property subject to the Motor Carrier Act of 1935; also Commissioner Joseph B. Eastman's letter of December 21, 1937, addressed to Mr. E. H. Bunnell, Vice-President, Association of American Railroads.

The Receivers of the Seaboard Air Line Railway engage in motor operations over routes paralleling certain parts of its line of railroad, the service furnished thereby being in conjuntion with and auxiliary to its rail line operations. No separate corporation is involved. Separation of the revenues earned by motor and rail operations, respectively, has not been maintained, the entire revenues from both rail and motor operations being accounted for under the Uniform System of Accounts for Steam Roads prescribed by the I. C. C.

The order of the I. C. C. dated November 29, 1937 prescribing a Uniform System of Accounts for Class I Common and Contract Motor Carriers of Property subject to the Motor Carrier Act of 1935 defines a Class I carrier,

as referred to in that order, as a carrier having average gross revenues of $100,000 or over annually from its motor operations for the three years immediately preceeding January 1, 1938. As there has been no separation of the revenues derived by Seaboard Air Line Railway from motor operations and rail operations, ascertainment as to whether such motor operations fall within the Class I classification of motor carriers is not possible for the reason that a record has not been kept of the traffic handled by our trucks in a way that would enable us to identify such traffic with the waybills.

In conformity with the suggestion contained in Commissioner Joseph B. Eastman's letter of December 21st, above referred to, application for exemption from the requirements of the Uniform System of Accounts prescribed for Class I Common and Contract Motor Carriers effective January 1, 1938 is hereby made, but for the reasons given in the next preceeding paragraph such application should not be considered as implying that our operations are subject to such accounting regulations.

Very truly yours,

R. P. JONES,
Chief Finance and Accounting Officer.

ORDER

INTERSTATE COMMERCE COMMISSION.

Ex Parte No. MC 17.

UNIFORM SYSTEM OF ACCOUNTS FOR CLASS I COMMON AND CONTRACT MOTOR CARRIERS OF PROPERTY.

In the matter of granting temporary exemption, under certain conditions, from the requirements of the Uniform System of Accounts for Class I Common and Contract

Motor Carriers of Property, to carriers which perform steam or electric urban or interurban railway service and motor carrier service under the same corporate entity:

PRESENT: Joseph B. Eastman, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

Upon consideration of the petition of Seaboard Air Line Railway, dated January 19, 1938, in the above entitled matter:

It is ordered, That the said Seaboard Air Line Railway be, and is hereby, exempted from the requirements of the Uniform System of Accounts for Class I Common and Contract Motor Carriers of Property, effective January 1, 1938, until further order of the Commission, provided, however, that the accounts of the said Seaboard Air Line Railway are maintained in conformity with the accounting system described in said petition.

Dated at Washington, D. C., this 28th day of January, A. D. 1938.

By the Commission, Commissioner Eastman.

(SEAL) W. P. BARTEL, *Secretary.*

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or ad-

vantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

PART II

(U. S. Code, Supp. I, Title 49, Secs. 301, et seq.)

AN ACT to amend the Interstate Commerce Act, as amended, by providing for the regulation of the transportation of passengers and property by motor carriers operating in interstate or foreign commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Interstate Commerce Act, as amended, herein referred to as "Part I," is hereby amended by inserting at the beginning thereof the caption "Part I," and by substituting for the words "this Act," wherever they occur, the words "this part," but such Part I may continue to be cited as the "Interstate Commerce Act," and said Interstate Commerce Act is hereby further amended by adding the following Part II:

SHORT TITLE

SEC. 201. This part may be cited as Part II of the Interstate Commerce Act.

APPLICATION OF PROVISIONS

SEC. 202. (a) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the pro-

curement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

(b) Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

(c) Notwithstanding any provision of this section or of Section 203, the provisions of this part shall not apply—

(1) To transportation by motor vehicle by a carrier by railroad subject to Part I or by a water carrier subject to Part III, incidental to transportation subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to Part I when performed by such carrier by railroad, and transportation subject to Part III when performed by such water carrier.

(2) To transportation by motor vehicle by any person (whether as agent or under a contractural arrangement) for a common carrier by railroad subject to Part I, an express company subject to Part I, a motor carrier subject to this part, or a water carrier subject to Part III, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be performed by such carrier or express company as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water to which such services are incidental.

DEFINITIONS

SEC. 203. (a) As used in this part—

(1) The term "person" means any individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes any trustee, receiver, assignee, or personal representatives thereof.

(2) The term "board" or "State board" means the commission, board, or official (by whatever name designated in the laws of a State) which, under the laws of any State in which any part of the service in interstate or foreign commerce regulated by this part is performed, has or may hereafter have jurisdiction to grant or approve certificates of public convenience and necessity or permits to motor carriers, or otherwise to regulate the business of transportation by motor vehicles, in intrastate commerce over the highways of such State.

(3) The term "Commission" means the Interstate Commerce Commission.

(4) The term "joint board" means any special board constituted as provided in Section 205 of this part.

(5) The term "certificate" means a certificate of public convenience and necessity issued under this part to common carriers by motor vehicle.

(6) The term "permit" means a permit issued under this part to contract carriers by motor vehicle.

(7) The term "license" means a license issued under this part to a broker.

(8) The term "State" means any of the several States and the District of Columbia.

(9) The term "express company" means any common carrier by express subject to the provisions of Part I.

(10) The term "interstate commerce" means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.

(11) The term "foreign commerce" means commerce between any place in the United States and any place in a foreign country, or between places in the United States through any foreign country, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.

(12) The term "highway" means the roads, highways, streets, and ways in any State.

(13) The term "motor vehicle" means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof determined by the Commission, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails, or a trolley bus operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service.

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to Part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to Part I.

(15) The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

(16) The term "motor carrier" includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

(17) The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle," who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

(18) The term "broker" means any person not included in the term "motor carrier" and not a bona fide employee or agent of any such carrier, who or which, as principal or agent, sells or offers for sale any transportation subject to this part, or negotiates for, or holds himself or itself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts, or arranges for such transportation.

(19) The "services" and "transportation" to which this part applies include all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with all facilities and property operated or controlled by any such carrier or carriers and used in the transportation of passengers or property in interstate or foreign commerce or in the performance of any service in connection therewith.

(20) The term "interstate operation" means any operation in interstate commerce.

(21) The term "foreign operation" means any operation in foreign commerce.

• • •

GENERAL DUTIES AND POWERS OF THE COMMISSION

SEC. 204. (a) It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

• • •

(6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; and

(7) For purposes of the administration of the provisions of this part, to inquire into the management of the business of motor carriers and brokers, and into the management of the business of persons controlling, controlled by, or under common control with, motor carriers to the extent that the business of such persons is related to the managment of the business of one or more motor carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted, and may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this part; and may transmit to Congress from time to time, such recommendations (in-

cluding recommendations as to additional legislation) as the Commission may deem necessary.

(b) The Commission may from time to time establish such just and reasonable classifications of brokers or of groups of carriers included in the term "common carrier by motor vehicle," or "contract carrier by motor vehicle," as the special nature of the services performed by such carriers or brokers shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this part, to be observed by the carriers or brokers so classified or grouped, as the Commission deems necessary or desirable in the public interest.

• • •

ADMINISTRATION*

SEC. 205 (a) The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers or brokers conducted or proposed to be conducted involve more than three States, refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this part with respect to such operations as to which a hearing is required or in the judgment of the Commission is desirable: Application for certificates, permits, or licenses; the suspension, change, or revocation of such certificates, permits, or licenses; applications for the approval and authorization of consolidations, mergers, and acquisitions of control or operating contracts; complaints as to violations by motor carriers or brokers of the requirements established under Section 204(a); and complaints as to rates, fares, and charges of motor carriers or the practices of brokers: *Provided, however,* That if the Commission is prevented by legal proceedings from referring a matter to a joint board, it may determine such matter as

provided in Section 17. The Commission, in its discretion, may also refer to a joint board any investigation and suspension proceeding or other matter not specifically mentioned above which may arise under this part. The joint board to which any such matter is referred shall be composed solely of one member from each State within which the motor-carrier or brokerage operations involved in such matter are or are proposed to be conducted: *Provided,* That the Commission may designate an examiner or examiners to advise with and assist the joint board under such rules and regulations as it may prescribe. In acting upon matters so referred, joint boards shall be vested with the same rights, duties, powers, and jurisdiction as are hereinbefore vested in members or examiners of the Commission to whom a matter is referred for hearing and the recommendation of an appropriate order thereon: *Provided, however,* That a joint board may, in its discretion, report to the Commission its conclusions upon the evidence received, if any, without a recommended order. Orders recommended by joint boards shall be filed with the Commission, and shall become orders of the Commission and become effective in the same manner, and shall be subject to the same procedure, as provided in the case of orders recommended by members or examiners under Section 17. If a joint board to which any matter has been referred shall report its conclusions upon the evidence without a recommended order, such matter shall thereupon be decided by the Commission, giving such weight to such conclusions as in its judgment the evidence may justify.

(b) Whenever there arises in the administration of this part any matter that the Commission is required to refer to a joint board, or that the Commission determines, in its discretion, to refer to a joint board, the Commission shall, if no joint board eligible to consider said matter is in existence, create a joint board to consider the matter when referred, and to recommend appropriate order there-

on. The Commission shall prescribe rules governing meetings and procedure of joint boards and may, in the event of legal proceedings preventing reference to a joint board, determine the matter as provided in Section 17. Except as hereinafter provided, a joint board shall consist of a member from each State in which the motor carrier or brokerage operations involved are or are proposed to be conducted. The member from any such State shall be nominated by the board of such State from its own membership or otherwise; or if there is no board in such State or if the board of such State fails to make a nomination when requested by the Commission, then the Governor of such State may nominate such member. The Commission is authorized to appoint as a member upon the joint board any such nominee approved by it. If both the board and the Governor of any State shall fail to nominate a joint board member when requested, then the joint board shall be constituted without a member from such State, if members for two or more States shall have been nominated and approved by the Commission. All decisions and recommendations by joint boards shall be by majority vote. If the board of each State from which a member of a joint board is entitled to be appointed shall waive action on any matter referred to such joint board, or if any joint board fails or refuses to act, or is unable to agree upon any matter submitted to it within forty-five days after the matter is referred to it or such other period as the Commission may authorize, or if a member shall not be nominated for more than one State (except only when the operations proposed shall be into or through territory foreign to the United States), then such matter shall be decided as in the case of any matter not required to be referred to a joint board. The failure of a duly appointed member of a joint board to participate in any hearing on a matter referred to such joint board, after notice thereof, shall be considered to constitute, as to the matter referred, a waiver of action on the part of the State from

which such member was appointed. When any proceeding required to be referred to a joint board shall involve operations of a motor carrier conducted or proposed to be conducted into or through territory foreign to the United States, if a single State shall be involved, or if only one State shall make nomination of a point board member through its Governor or State board, then the Commission, in such case, may receive from that State the nomination of not more than three members and may appoint such nominees to constitute the joint board. Members of joint boards when administering the provisions of this part shall receive such allowances for travel and subsistence expenses as the Commission shall provide. A joint board shall continue in existence for the consideration of matters referred to it by the Commission until such time as its existence may be terminated by the Commission. A substitution of membership upon a joint board from any State may be made at any time by nomination and appointment in the same manner as an original nomination and appointment.

(c) Where practicable and as the Commission may by rule or order direct, hearings by any member, examiner or joint board upon any matter referred to him or to such board shall be held at such places within the United States as are convenient to the parties.

(d) So far as may be necessary for the purposes of this part, the Commission and the members and examiners thereof and joint boards shall have the same power to administer oaths, and require by subpoena the attendance and testimoney of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents, and to take testimony by deposition, relating to any matter under investigation, as the Commission has in a matter arising under Part I; and any person subpoenaed or testifying in connection with any matter under investigation under this part shall have the same rights, privileges,

and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under Part I, unless otherwise provided in this part.

(e) In accordance with rules prescribed by the Commission, reasonable notice shall be afforded, in connection with any proceeding under this part, to interested parties and to the board of any State, or to the governor if there be no board, in which the motor-carrier operations involved in the proceeding are or are proposed to be conducted, and opportunity for intervention in any such proceeding for the purpose of making representations to the Commission or for participating in a hearing, if a hearing is held, shall be afforded to all interested parties.

(f) The Commission is authorized to confer with or to hold joint hearings with any authorities of any State in connection with any matter arising in any proceedings under this part. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities as fully as may be practicable, in the enforcement or administration of any provision of this part. From any space in the Interstate Commerce Commission Building not required by the Commission, the Government authority controlling the allocation of space in public buildings shall assign for the use of the national organization of the State commissions and of their representatives suitable office space and facilities which shall be at all times available for the use of joint boards created under this part and for members and representatives of such boards cooperating with the Commission or with any other Federal commission or department under this or any other Act; and if there be no such suitable space in the Interstate Commerce Commission Building, the same shall be assigned in some other building in convenient proximately thereto.

(g) Any final order made under this part shall be subject to the same right of relief in court by any party

in interest as is now provided in respect to orders of the Commission made under Part I: *Provided*, That, where the Commission, in respect of any matter arising under this part, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under the Urgent Deficiency Appropriations Act, October 22, 1913, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction.

(h) All the provisions of Section 17 of Part I shall apply to all proceedings under this part.

* * *

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

SEC. 206. (a) Except as otherwise provided in this section and in Section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to Section 210, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation, and has so operated since that time except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring sought to be acquired by the persons proposing in such

further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in Section 207(a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if ap-

plication for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

ISSUANCE OF CERTIFICATE

SEC. 207. (a) Subject to Section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificates shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

TERMS AND CONDITIONS OF CERTIFICATE

SEC. 208. (a) Any certificate issued under Section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limita-

tions as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under Section 204(a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

* * *

TEMPORARY GRANT OF AUTHORITY

210a. (a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of 180 days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

(b) Pending the determination of an application filed with the Commission for approval of a consolidation or merger of the properties of two or more motor carriers, or of a purchase, lease, or contract to operate the properties of one or more motor carr[illegible] the Commission may, in its discretion, and without hearings or other proceedings, grant temporary approval, for a period not exceeding 180 days, of the operation of the motor carrier properties pending application to acquire such properties, if it shall appear that failure to grant such temporary approval

may result in destruction of or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their future usefulness in the performance of adequate and continuous service to the public.

(c) Transportation service rendered under such temporary authority shall be subject to all applicable provisions of this part and to the rules, regulations, and requirements of the Commission thereunder.

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CONSOLIDATION, MERGER, AND ACQUISITION OF CONTROL

SEC. 213. (Repealed September 18, 1940. Provisions, with amendments, incorporated in Section 5 of Part I. See page 36 of Appendix I.)

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RATES, FARES, AND CHARGES OF COMMON CARRIERS BY MOTOR VEHICLE

SEC. 216. (a) It shall be the duty of every common carrier of passengers by motor vehicle to establish reasonable through routes with other such common carriers and to provide safe and adequate service, equipment, and facilities for the transportation of passengers in interstate or foreign commerce; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable regulations and practices relating thereto, and to the issuance, form, and substance of tickets, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the transportation of passengers in interstate or foreign commerce; and in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation

of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

(c) Common carriers of propery by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or de-

scription of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

(e) Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of Section 217. Whenever, after hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare, or charge, demanded, charged, or collected by any common carrier or carriers by motor vehicle or by any common carrier or carriers by motor vehicle in conjunction with any common carrier or carriers by railroad and/or express, and/or water for transportation in interstate or foreign commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate, fare, or charge or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate, fare, or charge or the maximum or minimum, or maximum and minimum rate, fare, or charge thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective and the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes, and joint rates, fares, charges, regulations, or practices, applicable to the transportation of passengers by common carriers by motor vehicle, or the maxima or minima, or maxima and minima, to be charged, and the terms and conditions under which such through routes shall be

operated; *Provided, however,* That nothing in this part shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever.

(f) Whenever, after hearing, upon complaint or upon its own initiative, the Commission is of opinion that the division of joint rates, fares, or charges, applicable to the transportation in interstate or foreign commerce of passengers or property by common carriers by motor vehicle or by such carriers in conjunction with common carriers by railroad and/or express, and/or water are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. The order of the Commission may require the adjustment of divisions between the carriers, in accordance with the order, from the date of filing the complaint or entry of order of investigation or such other date subsequent as the Commission finds justified and, in the case of joint rates prescribed by the Commission, the order as to divisions may be made effective as a part of the original order.

* * * *

(i) In the exercise of its power to prescribe just and reasonable rates, fares, and charges for the transporta-

tion of passengers or property by common carriers by motor vehicle, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service.

(j) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith.

TARIFFS OF COMMON CARRIERS BY MOTOR VEHICLE

SEC. 217. (a) Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points or its route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rate, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

* * *

ACCOUNTS, RECORDS AND REPORTS

SEC. 220. (a) The Commission is hereby authorized to require annual, periodical, or special reports from all motor carriers, brokers, and lessors (as defined in this section), to prescribe the manner and form in which such reports shall be made, and to require from such carriers, brokers, and lessors specific and full, true, and correct answers to all questions upon which the Commission may deem information to be necessary. Such annual reports shall give an account of the affairs of the carrier, broker, or lessor in such form and detail as may be prescribed by the Commission. The Commission may also require any motor carrier or broker to file with it a true copy of any contract, agreement, or arrangement between such carrier and any other carrier or person in relation to any traffic affected by the provisions of this part. The Commission shall not, however, make public any contract, agreement, or arrangement between contract carrier by motor vehicle and a shipper, or any of the terms or conditions thereof, except as a part of the record in a formal proceeding where it considers such action consistent with the public interest: *Provided*, That if it appears from an examination of any such contract that it fails to conform to the published schedule of the contract carrier by motor vehicle as required by Section 218(a), the Commission may, in its discretion, make public such of the provisions of the contract as the Commission considers necessary to disclose such failure and the extent thereof.

(b) Said annual reports shall contain all the required information for the period of twelve months ending on the thirty-first day of December in each year, unless the Commission shall specify a different date, and shall be made out under oath and filed with the Commission at its office in Washington within three months after the close of the year for which the report is made, unless additional

time be granted in any case by the Commission. Such periodical or special reports as may be required by the Commission under subsection (a) hereof shall also be under oath, whenever the Commission so requires.

(c) The Commission may prescribe for motor carriers the classes of property for which depreciation charges may properly be included under operating expenses, and the rate or rates of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and rates so prescribed. When the Commission shall have exercised its authority under the foregoing provisions of this subsection, motor carriers shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a rate of depreciation other than that prescribed therefor by the Commission, and no such carrier shall include under operating expenses any depreciation charge in any form whatsoever other than as prescribed by the Commission.

(d) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by motor carriers, brokers, and lessors, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys; and it shall be unlawful for such carriers, brokers, and lessors to keep any accounts, records, and memoranda contrary to any rules, regulations, or orders of the Commission with respect thereto. The Commission may issue orders, specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, correspondence, or documents of motor carriers, brokers, or lessors as may after a reasonable time be destroyed, and prescribing the length of time the same shall be pre-

served. The Commission or its duly authorized special agents, accountants, or examiners shall at all times have access to and authority, under its orders, to inspect and examine any and all lands, buildings, or equipment of motor carriers, brokers, and lessors; and shall have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents of such carriers, brokers, and lessors, and such accounts, books, records, memoranda, correspondence, and other documents of any person controlling, controlled by, or under common control with any such carrier, as the Commission deems relevant to such person's relation to or transactions with such carrier. Motor carriers, brokers, lessors, and persons shall submit their accounts, books, records, memoranda, correspondence, and other documents for the inspection and copying authorized by this paragraph, and motor carriers, brokers, and lessors shall submit their lands, buildings, and equipment for examination and inspection, to any duly authorized special agent, accountant, or examiner of the Commission upon demand and the display of proper credentials.

* * *

SEC. 5—POOLING; UNIFICATIONS, MERGERS, AND ACQUISITIONS OF CONTROL

(1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of Section 1 of this part, it shall be unlawful for any common carrier subject to this part, Part II, or Part III to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separte offense: *Provided*, That whenever the Commission is of opinion, after hearing

upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: *Provided further,* That any contract, agreement, or combination to which any common carrier by water subject to Part III is a party, relating to the pooling or division of traffic, service, or earnings, or any portion thereof, lawfully existing on the date this paragraph as amended takes effect, if filed with the Commission within six months after such date, shall continue to be lawful except to the extent that the Commission, after hearing upon application or upon its own initiative, may find and by order declare that such contract, agreement, or combination is not in the interest of better service to the public or of economy in operation, or that it will unduly restrain competition.

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers

through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in Section 205(e), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modification as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed

will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

* * *

LEGISLATIVE CHANGES

Setting forth details of additions and deletions in original Motor Carrier Act, 1935, caused by amendements in 1938 and 1940.

* * *

Key to changes:

Straight Type—Text of Original Act

Italics—Additions in 1940

Roman Bold—Deletions in 1940

SMALL CAPS—Additions in 1938

BOLD CAPS—Deletions in 1938

SHORT TITLE

Sec. 201. This part may be cited as **the "Motor Carrier Act, 1935."** *part II of the Interstate Commerce Act.*

Declaration of Policy and Delegation of Jurisdiction

APPLICATION OF PROVISIONS

Sec. 202. (a) It is hereby declared to be *the national transportation* policy of *the* Congress **to regulate transportation by motor carriers in such manner** *to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered* as to recognize and preserve the inherent advantages of *each;* **and foster sound economic conditions in, such transportation and among such carriers in the public interest;** *to* promote *safe,* adequate, economical, and efficient service

by motor carriers, and *foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of* reasonable charges **therefor** *for transportation services* without unjust discriminations, undue preferences or advantages, **and** *or* unfair or destructive competitive practices; **improve the relations between, and coordinate transportation by and regulation of motor carriers and other carriers** *to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of* developing, *coordinating,* and preserving a **highway** *national* transportation system **properly adapted to** *by water, highway, and rail, as well as other means, adequate to meet* the needs of the commerce of the United States, *of the Postal Service,* and of the national defense, **and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.** *All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.*

Sec. 202. **(b)** *(a)* The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

(c) *(b)* Nothing in this part shall be construed to affect the powers of taxation of the several states or to authorize a motor carrier to do an intrastate business on the highways of any state, or to interfere with the exclusive exercise by each state of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

(c) Notwithstanding any provision of this section or of section 203, the provisions of this part shall not apply—

(1) to transportation by motor vehicle by a carrier by railroad subject to part I or by a water carrier subject to part III, incidental to transportation subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad, and transportation subject to part III when performed by such water carrier.

(2) to transportation by motor vehicle by any person (whether as agent or under a contractural arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, or a water carrier subject to part III, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be performed by such carrier or express company as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water to which such services are incidental.

DEFINITIONS

Sec. 203. (a)—(No change in paras, (1) to (12), incl.)

(13) The term "motor vehicle" means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, OR ANY COMBINATION THEREOF DETERMINED BY THE COMMISSION, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails, *or a trolley bus operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service.*

(14) The term "common carrier by motor vehicle" means any person who or which undertakes, whether directly or by lease or any other arrangement to transport *holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of* passengers or property or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle *thereof* for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of Part I *except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.*

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RAILROAD CERTIFICATES

(Partial list and exclusive of Railway Express Agency).

Great Northern Railway Co. Common Carrier Appl	1 M. C. C. 73
Penna. Truck Lines, Inc.—Acquisition of Control	1 M. C. C. 101
Santa Fe Transp. Co.—Purchase—Rex	5 M. C. C. 1
Penna. Truck Lines, Inc.—Control—Barker M. Frt.	5 M. C. C. 9
Penna. Truck Lines, Inc—Purchase—Cain	5 M. C. C. 73
Penna. Truck Lines, Inc.—Control—Alko Exp. Lines	5 M. C. C. 77
Texas & Pac. Motor Transport Co.—Purchase—Johnson	5 M. C. C. 89
Santa Fe Transp. Co.—Purchase—Schaeffer	5 M. C. C. 115

Burlington Transp. Co.—Purchase—Bell Transfer, Inc ..... 5 M. C. C. 291
Pacific M .Trucking Co.—Control—People Frt. Line, Inc ..... 5 M. C. C. 302
Rock Island M. T. Co.—Purchase—White Line M. Frt ..... 5 M. C. C. 451
Motor Transport Co.—Purchase—Jansen.... 5 M. C. C. 570
Rock Island M. Transit Co.—Purchase—Burlington Transp ..... 5 M. C. C. 629
Rio Grande Motor Way Inc.—Purchase—Colman ..... 5 M. C. C. 643
Texas & Pac. Motor Transport—Purchase—Southern Transp ..... 5 M. C. C. 653
Burlington Transp. Co.—Purchase—Sand.... 5 M. C. C. 658
Kansas City S. Transp. Co., Inc., Common Carrier Appl ..... 10 M. C. C. 221
Texas & Pac. Motor Transport Co., Common Carrier Appl ..... 12 M. C. C. 37
Illinois Central R. Co., Common Carrier Appl ..... 12 M. C. C. 485
Santa Fe Trail Transp., Common Carrier Appl ..... 14 M. C. C. 577
Texas & Pac. Motor Transport Co.—Extension ..... 14 M. C. C. 645
Texas & Pac. Motor Transport Co.—Extension ..... 14 M. C. C. 649
Minneapolis & St. L. R. Co.—Purchase—Brown ..... 15 M. C. C. 54
Missouri Pac. Frt. Transp. Co.—Purchase—Miller ..... 15 M. C. C. 269
Southern Pac. Transp. Co.—Purchase—Sanders ..... 15 M. C. C. 299
Southern Pac. Transp. Co.—Purchase—Pilarczyk ..... 15 M. C. C. 309
Frisco Transp. Co.—Purchase—Cooper..... 15 M. C. C. 317
Frisco Transp. Co.—Purchase—Hamm..... 15 M. C. C. 320
Frisco Transp. Co.—Purchase—Rose..... 15 M. C. C. 323

Pacific Motor Trucking Co.—Purchase—
Keithly ..... 15 M. C. C. 427
Burlington Transp. Co.—Purchase—
Busskohl ..... 15 M. C. C. 691
Gulf, M. & N. R. Co., Common Carrier Appl. 18 M. C. C. 721
Missouri Pac. R. Co., Extension ..... 19 M. C. C. 605
Great Northern Ry. Co., Extension ..... 19 M. C. C. 745
Missouri Pac. R. Co., Extension ..... 20 M. C. C. 563
Willett Co. of Ind., Inc., Extension ..... 21 M. C. C. 405
Rock Island Motor Transit Co., Common
Carrier Appl ..... 21 M. C. C. 513
Pacific Motor Trucking Co., Common
Carrier Appl ..... 21 M. C. C. 761
Barcus Extension ..... 22 M. C. C. 147
Louisiana, A. & T. Ry. Co., Common
Carrier Appl ..... 22 M. C. C. 213
Penna. Truck Lines, Inc., Common
Carrier Appl ..... 24 M. C. C. 261
Rock Island M. Transit Co.—Purchase—
Clark ..... 25 M. C. C. 87
Frisco Transp. Co.—Purchase—Parker ..... 25 M. C. C. 96
Rock Island M. Transit Co.—Purchase—
Peterson ..... 25 M. C. C. 153
Southern Pac. Transport Co.—Purchase—
Beckman ..... 25 M. C. C. 179
Rock Island M. Transit Co.—Purchase—
Swaim ..... 25 M. C. C. 350
Haggerty Contract Carrier Appl. ..... 26 M. C. C. 413
Kansas City S. Transport Co., Inc., Common
Carrier Appl ..... 28 M. C. C. 5
White Common Carrier Appl. ..... 29 M. C. C. 599
Rock Island Motor Transit Co.—Extension 29 M. C. C. 695
Northern Pac. Transport Co., Extension ..... 30 M. C. C. 58
Rock Island Motor Transit Co.—Extension 30 M. C. C. 243
Chicago & N. W. Ry. Co.—Extension ..... 30 M. C. C. 379
Texas & Pac. Motor Transp. Co.—
Extension ..... 30 M. C. C. 465

Illinois Central R. Co.—Extension.....30 M. C. C. 477
Atlantic C. L. R. Co.—Extension.....30 M. C. C. 490
Chicago, R. I. & P. Ry. Co.—Extension.....30 M. C. C. 621
Chicago & N. W. Ry. Co., Common Carrier
Appl .....31 M. C. C. 299
Chicago & N. W. Ry. Co., Extension.....31 M. C. C. 455
Seaboard Air Line Ry. Co.—Extension.....31 M. C. C. 658
Frisco Transp. Co.—Extension.....32 M. C. C. 141
Gulf Transp. Co.—Extension.....32 M. C. C. 762
Penna. Truck Line, Inc., Common Carrier
Appl .....33 M. C. C. 21
Texas & Pac. Motor Transport Co.—
Extension .....33 M. C. C. 38
Unadilla Valley Ry. Co., Common Carrier
Appl .....33 M. C. C. 219
Steinman Extension.....33 M. C. C. 298
Santa Fe Transp. Co., Common Carrier
Appl .....33 M. C. C. 333
Rock Island Motor T. Co.—Extension.....33 M. C. C. 349
Rock Island Motor T. Co.—Extension.....33 M. C. C. 506
Great Northern Ry. Co., Common Carrier
Appl .....33 M. C. C. 593
Darby Common Carrier Appl.....33 M. C. C. 715
Burlington Transp. Co.——Extension.....33 M. C. C. 781
Jacobs Transfer Co.—Extension.....34 M. C. C. 93
Pacific Motor Trucking Co., Common Carrier
Appl .....34 M. C. C. 249
Siebert Extension.....34 M. C. C. 340
Chicago, M., St. P. & P. R. Co.—Extension.....34 M. C. C. 475
Frisco Transp. Co.—Purchase-Reddish.....35 M. C. C. 132
Frisco Transp. Co.—Purchase-Bennett.....35 M. C. C. 802
Rock Island Motor Transit—Purchase.....39 M. C. C. 59
Pacific Motor Trucking Co.—Purchase.....39 M. C. C. 441
McNichols Transfer Co.—Extension.....41 M. C. C. 191
Illinois Central R. Co.—Extension.....41 M. C. C. 211
Missouri Pac. R. Co.—Extension.....41 M. C. C. 241

Penna. Truck Lines, Inc., Common Carrier Appl ..... 41 M. C. C. 607
Texas & Pac. Motor Transp. Co., Common Carrier Appl ..... 41 M. C. C. 721
Flatt Common Carrier Appl ..... 41 M. C. C. 791
Kansas City S. Ry. Co.—Extension ..... 42 M. C. C. 74
Frisco Transportation Co.—Extension ..... 42 M. C. C. 219
Penna. Truck Lines, Inc.—Extension ..... 42 M. C. C. 733
Penna. Truck Lines, Inc.—Extension ..... 42 M. C. C. 759
Rock Island Motor Transp. Co.—Extension ..... 43 M. C. C. 470
Campbell Sixty-six Exp., Inc. v. Frisco Transp. Co. ..... 43 M. C. C. 641
Burlington Transp. Co.—Extension ..... 43 M. C. C. 729
Rock Island Motor Transit Co.—Purchase, M. C. F. 2374 ..... 1-4-45, not yet reported

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF VIRGINIA.

CIVIL ACTION No. 285

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

BRIEF FOR THE UNITED STATES

This is a suit, brought on behalf of affected trucking interests, to set aside orders of the Interstate Commerce Commission granting operating authority as a common carrier of property by motor vehicle to the receivers of the Seaboard Air Line Railway.[1]

The railroad filed some fourteen applications for operating authority as a motor carrier along routes paralleling its rail line. Eight of the applications were filed on the

[1] Legh R. Powell, Jr., and Henry W. Anderson. Applicant will be referred to hereinafter as "Seaboard" or as the "railroad."

same day, February 23, 1937. Another was filed on May 26, 1937, two on August 9, 1937, another on August 30, 1937, and two others on February 21, 1938, and August 15, 1938, respectively. In the aggregate these applications substantially parallel Seaboard's entire rail line, as shown in the map attached to the complaint as Exhibit "A-3." However, the applications were so worded that each of them, individually, covered only territory in one or two states. Consequently, the Commission, pursuant to Section 205(a) of the Interstate Commerce Act (49 U. S. C. A. 305 (a)), referred each application to a Joint Board. Each Joint Board took testimony only with respect to operations within the territory embraced in the particular application referred to it. Plaintiffs and other protestant motor carriers sought to offer evidence regarding the economic effect of the railroad's truck operations over the entire territory which the railroad was planning to serve under the series of applications filed, but such evidence was excluded by the Joint Boards. Timely requests by plaintiffs to consolidate the applications for hearing were denied by the Commission.[2]

After reports had been made by each of the Joint Boards, and exceptions filed thereto, the Commission (Division 5) on July 11, 1939, in its report and order (17 M. C. C. 413) granted the applications, subject to certain conditions.[3] Condition No. (3) was that "Shipments

[2]Plaintiffs point out in their brief (p. 109) that the dates of the hearings before the Joint Boards were held almost simultaneously, with the result that protestants were not able to present their case properly to each of the Joint Boards.

[3]These conditions were:

(1) The service by motor vehicle to be performed by applicants shall be limited to service which is auxiliary to or supplemental of the service of the Seaboard Air Line Railway;

(2) Applicants shall not serve any point not a station on the rail lines of the Seaboard Air Line Railway;

(3) Shipments transported by applicants by motor vehicle shall be limited to those which move under a through bill of lading covering, in addition to movement by motor vehicle, a prior or subsequent movement by rail.

transported by applicants by motor vehicle shall be limited to those which move under a through bill of lading covering, in addition to movement by motor vehicle, a prior or subsequent movement by rail".

Thereafter, upon petition by the railroad, the Commission reconsidered[4] the desirability of imposing the condition requiring prior or subsequent rail haul and decided that that condition should be eliminated from the certificate granted to the railroad, and should be replaced by a so-called "key-point" restriction prohibiting transportation between certain points, or through or to or from more than one of said points.[5]

Subsequently, the Seaboard petitioned for modification of the key points prescribed by the Commission. Thereupon, the Commission consolidated all the applications for hearing.[6] This hearing, however, was limited to the sole question "whether Condition 3 as set forth in the

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(4) Such further specific conditions as we in the future may find it necessary to impose in order to restrict applicants' operations by motor vehicle to service which is auxiliary to or supplemental of the rail service of the Seaboard Air Line Railway.

[4]The conditions applicable to the Seaboard were considered in connection with objections made by other railroads to similar conditions. The Commission's decision dated January 24, 1941, is reported in 28 M. C. C. 5 under the heading "Kansas City Southern Transport Company, Incorporated, Common Carrier Application."

[5]The "key-point" restriction reads:

"No shipments shall be transported by applicants as a common carrier by motor vehicle from Gaston, S. C., to Swansea, North, Denmark, Fairfax, and Garnett, S. C., nor from Garnett to Estill, Fairfax, Denmark, and Gaston, S. C., nor between any of the following points, or through or to or from more than one of said points: Raleigh, Henderson, Hamlet, Aberdeen, Sanford, Apex, Southern Pines, Laurinburg, Maxton, Pembroke, Lumberton, Bladenboro, Wilmington, Monroe, Charlotte, Lincolnton, Shelby, and Ellenboro, N. C., Richmond and Petersburg, Va., Columbia, Cheraw, McBee, Greenwood, and Clinton, S. C., and River Junction, Quincy, Tallahassee, and Monticello, Fla."

[6]It will be noted that the Commission did consolidate the applications for hearing when the railroad desired the conditions to be modified, although the Commission did not consolidate the applications when the motor carriers had requested that they be consolidated for a hearing on their merits with respect to the issue of public convenience and necessity.

prior report, * * * should be modified, and, if so, the extent of such modification.'"[7]

At this hearing the Antitrust Division of the Department of Justice had intervened, and sought to present testimony regarding the effect of Seaboard's motor truck operations upon competitive conditions in the industry. The Department on December 5, 1941, petitioned for reopening of the proceeding in order that such evidence might be heard.[8] On January 21, 1942, the Commission decided that Condition 3 should be modified, as requested by the railroad.[10] Certificates were later issued accordingly, but apparently the railroad has not actually instituted service on all the routes where operating authority was granted.

As required by Section 208 of the Judicial Code (28 U. S. C. A. 46), this suit was brought against the United States, the Interstate Commerce Commission being joined as a defendant. On November 29, 1943, the United States filed its answer, admitting the allegations of the complaint, as amended, and that the relief prayed for should be granted, and that the orders of the Interstate Commerce Commission assailed in the present suit be set aside for mistake of law and failure to afford a full and fair hear-

[7]Commission's orders of July 25, 1941, and October 3, 1941. Exs. "N" and "O" to complaint.

[8]Ex. "P" to complaint. A similar petition was filed the same day by plaintiff American Trucking Associations, Inc. Ex. "Q" to complaint.

denied rehearing.[9] On July 6, 1942, the Commission

[9]Ex. "R" to complaint.

[10]34 M. C. C. 441. As modified, condition 3 reads:

"No shipments shall be transported by applicants as a common carrier by motor vehicle from Richmond to Petersburg, Va., not including shipments moving from Richmond through Petersburg to points between Petersburg and Henderson, N. C., from Monroe to Charlotte, N. C., or from Charlotte to Monroe not including shipments moving from or to Rutherfordton, N. C., or points between Charlotte and Rutherfordton, nor between the following points or to or through or from more than one of said points: Richmond, Va., Henderson, Raleigh, Hamlet, Monroe, and Wilmington, N. C.; Hartsville, Columbia, Garnett, and Greenwood, S. C.; and Jacksonville, Tallahassee and Tampa, Fla."

ing. On or about December 17, 1943, the Interstate Commerce Commission filed its answer in support of the Commission's order; and on January 6, 1944, the Seaboard was granted leave to intervene, and filed its answer in support of the Commission's order

QUESTIONS PRESENTED

1. Should the Commission's orders be set aside by this Court for mistake of law or failure to apply the proper statutory standards?

2. Should the Commission's orders be set aside as arbitrary, or for abuse of discretion, because of failure to afford a full and fair hearing?

ARGUMENT

Under well-settled doctrine as to the scope of judicial review, this Court may set aside an order of the Commission for mistake of law or for failure to apply the proper statutory standards. Interstate Commerce Commission v. Union Pacific Railroad Company, 222 U. S. 541, 547 (1912); United States v. Carolina Freight Carriers Corporation, 315 U. S. 475, 488-490 (1942); Scripps-Howard Radio, Inc., v. Federal Communications Commission, 316 U. S. 4, 10 (1942). Similarly, an order of the Commission may be set aside if it is arbitrary or unreasonable, or by an abuse of discretion results in denial of a fair and full hearing. Interstate Commerce Commission v. Union Pacific Railway Company, 222 U. S. 541, 547 (1912); Atchison, Topeka & Santa Fe Railway Company v. United States, 284 U. S. 248, 262 (1932).

This defendant respectfully submits that:

I. The Commission's orders should be set aside for mistake of law, and

II. The Commission's orders should be set aside as arbitrary and unreasonable, for abuse of discretion in denying a fair and full hearing.

I. THE COMMISSION'S ORDERS SHOULD BE SET ASIDE FOR MISTAKE OF LAW

The antitrust laws, and the policy embodied therein of promoting competition,[11] apply to all forms of transportation, except where specific statutory provisions authorize departure therefrom.[12] United States v. Trans-Missouri Freight Association, 166 U .S. 290 (1897); United States v. Joint Traffic Association, 171 U. S. 505 (1898). In furtherance of its policy of competition in the transportation field, Congress has prohibited the control of one form of transportation by another except under the most limited of conditions. Thus in 1912, Congress announced its policy of preserving the independence of water carriers by including in the Panama Canal Act[13] a provision designed to prevent their domination by railroads. In 1938 a similar proviso was inserted in Section 408(b) of the Civil Aeronautics Act.[14] Likewise, in Section 213(a) of the Motor Carrier Act of 1935, Congress undertook to preserve the motor carrier industry from domination or control by other forms of transportation which "might use the control as a means to strangle, curtail, or hinder progress in highway transportation for the benefit of the other competing transportation".[15]

[11] *Northern Securities Company* v. *United States*, 193 U. S. 197, 337-8 (1904); *United States* v. *Trenton Potteries Company*, 273 U. S. 392, 397 (1927).

[12] Congress has established requirements that certificates of convenience and necessity be obtained, that published rates be adhered to, and that mergers and acquisitions of carriers may be effected on certain terms, requiring approval by a public agency.

[13] 37 Stat. 560, 566. See also H. Rep. No. 423, 62nd Cong., 2nd Sess., p. 12, and 33 I. C. C. 700, 716.

[14] 52 Stat. 973, 1001; 54 Stat. 785; 49 U. S. C. A. 401, 488.

[15] 79 Cong. Rec. 5655, 12205-6. Section 213 of the Motor Carrier Act of 1935 is now included in Section 5 of the Interstate Commerce Act (49 U. S. C. A. 5).

This legislative policy was evolved out of years of experience. Seldom have new forms of transportation been developed by those engaged in operating the older means of transportation. On the contrary, the older transportation agencies have generally resisted the new, and have entered the new field only after its commercial possibilities have been demonstrated and the more progressive form has come to be regarded as a competitive threat to the old. Then the purpose was generally to suppress the new form of transportation in order to protect investments in the more obsolete methods.

As a result of this policy, the Interstate Commerce Act provides that, in a proceeding where the Commission's approval is sought in order to authorize a merger or acquisition of a motor carrier, the Commission is required, in case the party acquiring control of the motor carrier is a railroad, or affiliated with a rail carrier, to exercise a stricter rule than would otherwise be applicable. Section 5(2)(b) of the Act contains a proviso that in such a case, in addition to the usual finding that the proposed transaction "will be consistent with the public interest," the Commission must also find (1) that the transaction will enable such rail carrier "to use service by motor vehicle to public advantage in its operations," and (2) "will not unduly restrain competition."

The Supreme Court has held, in McLean Trucking Company v. United States, 321 U. S. 67, 86-87 (1944), that in a proceeding under Section 5 of the Act, it is the duty of the Commission to consider the effect which a proposed merger will have upon competitive conditions. This being true of an ordinary merger, the rule would apply a fortiori in case of any railroad connection.

This congressional policy requiring strict scrutiny of railroad control of motor carriers, in order to prevent monopolistic conditions or restraints upon competition,

undoubtedly must be given effect by the Commission in cases where the railroad itself seeks to engage in business as a motor carrier by obtaining a certificate of public convenience and necessity under Section 207 of the Act (49 U. S. C. A. 307).

Under federal law, the concept of "public convenience and necessity" clearly embraces the preservation of healthy competitive conditions. Indeed, it has been held that new service may be authorized for the very purpose of providing the public with the benefits of competition. In Chesapeake & Ohio Railway Company v. United States, 283 U. S. 35, 41-43 (1931), the Supreme Court said:

> In the absence of a plain declaration to that effect, it would be unreasonable to hold that Congress did not intend to empower the Commission to authorize construction of new lines to provide for shippers such competing service as it should find to be convenient or necessary in the public interest. (p. 42).

In Davidson Transfer & Storage Company v. United States, 42 F. Supp, 215, 219 (E. D. Pa., 1942), it was likewise held that "one of the weapons in the Commission's arsenal is the right to authorize competition."[16]

Consequently, it is submitted that the Commission's orders are vitiated by mistake of law by reason of the Commission's failure to consider the important public question of the competitive effect of the Seaboard's entry into the motor carrier field.[17] Texas & Pacific Railway

[16]Federal law affords less protection to existing carriers against competition from new operators than is the case under state law in many jurisdictions. *Pennsylvania Railroad Company* v. *United States*, 40 F. (2d) 921, 925 (W. D. Pa., 1930); *Indian Valley Railroad Company* v. *United States*, 52 F. (2d) 485, 487 (N. D. Cal., 1931). *Cf. North Coast Transportation Company* v. *Department of Public Works*, 157 Wash. 79 81 (1930).

[17]It is true in its report of July 11, 1939, the Commission finds that it does not appear "from the records made in these cases that there will be any great diversion of traffic from existing independent motor carriers." Ex. "L" to complaint, p. 78. But, obviously, there could be no evidence in "the records made in these cases" when the Commission

Company v. Interstate Commerce Commission, 162 U. S. 197, 217 (1896).

It was also a palpable mistake of law and misapprehension of the proper statutory standards for the Commission to apply a different rule to the Seaboard's application than it would have applied if the applicant had not been a railroad. This point is discussed at length in plaintiffs' brief (p. 41 et seq.) and need not be elaborated here. The language of the statute is plain and unambiguous. It provides[18] that the Commission shall issue a certificate authorizing operation as a motor carrier "if it is found that * * * the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity."

Obviously, this statutory requirement applies equally to all applicants for certificates as a motor carrier. Whether the applicant is a railroad, a railroad subsidiary, or an independent corporation or an individual, is immaterial. Proof of public, not private, convenience and necessity is necessary as a prerequisite to the institution of motor carrier operations, whoever the party may be who proposes to carry on such operations. Mere "railroad convenience" or benefit or advantage to Seaboard in carrying on its business is obviously insufficient compliance with the requirements of law.[19]

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denied to the Antitrust Division and to plaintiffs any opportunity to present evidence regarding the competitive effect of the Seaboard's motor carrier operations. The quoted passage of the Commission's report must therefore be regarded as a finding made without support in the evidence. *Interstate Commerce Commission* v. *Union Pacific Railroad*, 222 U. S. 541, 547 (1912) Chicago Junction case, 264 U. S. 258, 265 (1924); *Interstate Commerce Commission* v. *L. & N. Railroad Company*, 227 U. S. 88, 91-2 (1913).

[18]Section 207(a), 49 U. S. C. A. 307(a).

[19]It is equally clar, as plaintiffs point out in their brief (p. 120), that Congress in the Interstate Commerce Act has established three and only three classes of transportation; rail, motor, and water, respectively. Each of these types of transportation is clearly differentiated from the others, and each is subjected to its own particular statutory

In another respect also, as plaintiffs have pointed out in their brief (p. 59), the Commission seems to have entertained an erroneous conception of the criteria to be applied by it in determining whether public convenience and necessity require motor carrier operations by Seaboard.

It seems clear that the entire "key-point" theory is based directly upon the operating convenience of the railroad, and that the Commission is selecting as key points those which may from time to time be indicated as suitable by the operating practices of the railroad. The Commission seems to take the view that public convenience and necessity requires anything which is beneficial or advantageous to the railroad. Thus in the order of January 24, 1941, the Commission points out that with respect to traffic which can be moved in well-loaded cars on through trains "the railroads have no need to substiute truck service for such rail service."[20]

The Commission apparently took the view that any reduction in the railroad's operating expenses was beneficial to the general public and "required by public convenience and necessity."[21]

That the Commission based its "key-point" conditions upon railroad operating convenience is shown by the following language from the Commission's report:

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scheme of regulation. Each is separately treated by the law, and the requirements imposed upon each type of carrier vary. The mere fact that Seaboard is a rail carrier does not per se authorize it to engage in line haul service as a motor carrier, without fully complying with all the requirements which the law has prescribed for the regulation of motor carriers. Those requirements include not only the provision requiring proof of public convenience and necessity, but also the requirements as to tariffs and accounting. Plaintiffs' brief (pp. 87-88) presents a rather convincing picture of Commission action in accordance with a preconceived notion held by the Commission prior to the enactment of federal legislation regulating motor carrier transportation, rather than in accordance with the scheme actually adopted by Congress and established by existing law.

[20]Ex. "M" to complaint p. 86.

[21]Ex. "M" to complaint, p. 86.

As the above quotations indicate, the thought of division 5 in regard to this matter was that public convenience and necessity required a co-ordinated rail-and-truck service, which, upon the records of the cases before it, could only be furnished efficiently and effectively by conducting the two forms of transportation under a single control, but that there was adequate independent motor-carrier service between all stations, generally speaking, so that public convenience and necessity did not require the institution between the stations of new motor-carrier service under railroad control which is not coordinated with prior or subsequent rail service. Hence condition 3. Upon further consideration, we are of the opinion that the division gave insufficient weight to the fact that the railroad, as well as the independent motor carriers, has been and is furnishing service between the stations, but that between many of them the present means of railroad service, the way-freight train, is uneconomical and inefficient. This is the reason for coordinating truck service with the rail service, and, as we have found (and as division 5 also found), public convenience and necessity require the increased economy and efficiency which will result from such substituted use of trucks. By the same reasoning, however, public convenience and necessity require the substitution of trucks for way-freight train service regardless of whether there is a prior or subsequent movement by rail. Such substitution is a part of the plan of coordination, and unless it can be accomplished, the full benefits in increased economy and efficiency which the public interest demands cannot be secured."[22]

It is obvious from the foregoing reasoning that Commission, in abandoning the prior or subsequent rail haul condition prescribed by Division 5, is abandoning also any justification for authorizing the railroad's truck operations because they constitute an element of a coordinated rail and truck service, of a different character from that performed generally either by rail or motor carriers. The

[22]Ex. "M" to complaint, pp. 87-88.

substitution of pure motor carrier service, differing from the "adequate independent motor carrier service" already existing only in its being under railroad control, is obviously not the establishment of a new and different type of service beneficial to the public.

So far as the public is concerned, it will receive from the railroad, acting as a motor carrier, only he same type of all motor service which it would otherwise receive from the independent motor carriers not controlled by the railroad. The only justification for such service is that it is less costly to the railroad; and if it be assumed that the railroad is under obligation to continue to transport traffic between the stations in question, it would then conceivably be of indirect benefit to the public to permit the railroad to adopt the cheaper method, since the railroad rates will always be increased to such extent as is necessary to afford what is regarded a reasonable rate of return on the capital invested in the railroad business. But the fallacy of this assumption is that it is not necessarily true that the railroad is obliged to remain in business, if available traffic is not sufficient to afford revenues greater than operating expenses. *Brooks-Scanlon Co.* v. *R. R. Comm. of Louisiana*, 251 U. S. 396 (1920).

If the inherent advantages of motor transportation in particlar instances are such that it should be utilized in preference to rail transportation, the logical consequence would seem to be that such traffic should go to motor carriers and not to rail carriers, rather than that rail carriers should seek to transform themselves into motor carriers in order to continue to handle traffic which can no longer be economically or efficiently handled by them as rail carriers.[23]

[23]The Commission contends: "That in all of these cases the railroad has been and is transporting the traffic in question between its stations and is under obligation to continue to do so. What it is seeking is not to enter a new field of service but to substitute a more efficient for a less efficient means of service. In both its direct and indirect effect such

Regarding "key-points" the Commission goes on to say:

> It does not follow, however, that public convenience and necessity require in these cases a grant of operating authority to provide motor-carrier service between all the stations. There are certain larger points on the lines of the respective railroads here involved between which through freight trains are operated. Such trains include package or merchandise cars which are set out at the principal points, commonly referred to as key or break-bulk points.
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> * * *
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> Applicants admit that rail service by through trains is economical and efficient for these longer hauls and that the operation of through package or merchandise cars transporting less-than-carload freight between key points will be maintained. In the circumstances, there is no need of substituting truck service, and public convenience and necessity do not require the establishment between such points of truck service under railroad control. An appropriate condition will therefore be imposed prohibiting the transportation of shipments by motor vehicle between key points. It is noted that in some instances through train service is maintained between key points, whereas in others such service is maintained in only one direction, or the key points served in one direction may differ from those served in the opposite direction. Our findings will take account of such circumstances.
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> Some difficulties have been encountered, however, in determining which points are actually the key points in all instances in view of the limited record with

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substitution is in the public interest." Ex. "M" to complaint, p. 88.

This is obviously unsound reasoning. Even assuming that a rail carrier is under obligation to continue to offer rail service between certain stations, even at a loss, it does not follow that it is under any obligation to furnish motor carrier service between those points. When a railroad establishes motor carrier service, pure and simple, it is undoubtedly entering "a new field of service." Perhaps the railroad "has been * * * transporting the traffic in question" between such stations, but it has no legal right to continue to do so if the public prefers to use some other mode of transportation which is more efficient or economical.

respect thereto. We recognize also that these points may change from time to time. Consequently, applicants may file appropriate petitions requesting us to amend the order herein so as to reflect any changes in the location of such points. Our attention may also be directed to any key points which may have been omitted. In the event any present modification is required in the designation of the key points, it should be brought to our attention by appropriate petitions filed within 30 days after the service of this report. We should also be advised by appropriate petitions of any changes in key points which may occur in the future. Such petitions should set forth fully the facts relative to the necessity for any such change.[24]

It seems plain that the "restrictions" to be imposed by the Commission, under the quoted language, are based entirely upon what the railroad wishes to do. "Key points" are apparently to be defined only as being points between which the operation of freight trains by the railroad "will be maintained." In circumstances where the railroad decides to continue operating as a railroad, "there is no need of substituting truck service." Consequently, in such circumstances, the Commission concludes that "public convenience and necessity do not require the establishment between such points of truck service under railroad control." This amounts merely to saying that if the railroad wishes to run trains, it does not need to run trucks instead, and consequently "public convenience and necessity" do not require that the railroad run trucks.

When "public convenience and necessity" is thus treated as an automatic consequence of what a railroad does, it would seem to follow inescapably that the Commission has in truth adopted "railroad convenience" as its standard of judgment, and departed from the criterion of public convenience and necessity prescribed by the applicable statute.

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[24] Ex. "M" to complaint, pp. 88-89.

The dependence of the Commission's decision upon the current practice of the railroad is further shown by the fact that if the railroad is maintaining train service between "key points" served in one direction differ from those served in the opposite direction, the Commission obligingly annuounces that "our findings will take account of such circumstances." The Commission also recognizes that "these points may change from time to time."

In other words, whenever and wherever the railroad discontinues its rail service, the Commission recognizes the "need of substituting truck service" and will authorize it as being required by "public convenience and necessity." In adopting a rule such as this, the Commission undoubtedly misapplied the standards prescribed by statute, and fell into a patent mistake of law.

II. THE COMMISSION'S ORDERS SHOULD BE SET ASIDE AS ARBITRARY AND UNREASONABLE, FOR ABUSE OF DISCRETION IN DENYING A FAIR AND FULL HEARING

The effect of the procedure followed by the Commission was to deprive plaintiffs and other motor carrier protestants, as well as the Antitrust Division of the Department of Justice, of any opportunity to offer evidence with respect to the important public question of the effect on competitive conditions of Seaboard's entry into the motor carrier field to the extent contemplated by the fourteen applications filed by the railroad.[25] Likewise, the plaintiffs and other motor carrier protestants were prevented from introducing evidence with regard to the matters set forth in paragraph 8 and 11 of the complaint. In view of the Commission's refusal to consolidate the applications and

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[25]See the Department's petition. Ex. "B" to complaint.

to hear evidence with respect to the foregoing pertinent matters, it is plain that the Commission did not accord the parties a fair hearing and that its order is vitiated by an abuse of discretion amounting to arbitrary and unreasonable action.

Very logically and naturally each of the Joint Boards to which the individual applications were referred excluded evidence going beyond the operations covered by the particular application referred to such Joint Boards. The Commission refused to consolidate the applications for hearing. At no subsequent time was there any opportunity afforded for the presentation of evidence on the vital and essential isues mentioned above. The Commission in its report of July 11, 1939, dealt in a single report with the recommendations made by the various Joint Boards with respect to all the applications; but this action of the Commission was based upon the separate records developed before the Joint Boards with respect to the individual applications, and as has been seen, the Joint Boards declined to receive evidence regarding the effect on competitive conditions of the Seaboard's motor carrier operations as a whole. The subsequent order of the Commission on January 24, 1941, which substituted the so-called "key point" restriction for the prior and subsequent rail-haul restriction, was made without hearing and additional evidence, and was based upon the same records which had previously been developed before the Joint Boards.

When the railroad was not satisfied with the "key point" restrictions, and requested their modification, the Commission did consolidate the several applications for hearing; but this hearing was limited to the question of determining the appropriate "key points." Thus, even after the applications had been consolidated for hearing, plaintiffs and protestant motor carriers and the Antitrust Divi-

sion of the Department of Justice were denied any opportunity to offer evidence on the important question vital to the proper determination of the case. Evidence could not be offered on the basic issue of public convenience and necessity, as to whether there was any need at all for Seaboard's motor carrier service. Likewise, there was no opportunity to presnt evidence regarding the propriety of substituting the so-called "key point" restrictions for the prior and subsequent rail-haul restriction. The only matter with respect to which the Commission was willing to permit evidence to be offered was the question whether the key points named in its order of January 24, 1941, should be modified by substituting in lieu thereof the points which were enumerated in the Commission's report of July 6, 1942.

Obviously, such a partial hearing was not sufficient.[26] The parties are entitled to a full and fair hearing on every phase of the case, which is an essential part of the determination which the Commission must make in order to perform its statutory function.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the orders of the Interstate Commerce Commission which are assailed in the case at bar are based upon a mistaken view of the law and upon misapprehension of the proper statutory standards, and that the said orders are arbitrary and unreasonable by reason of the Commission's abuse of discretion in denying to the parties a full and fair hearing and an opportunity to present evidence upon important issues essential to correct decision of the questions pending before the Commission. Consequently, the

[26]The limited hearing held by the Commission would be analogous to permitting a person accused of murder to be heard with respect to the choice of modes of execution, but not to be heard on the question of guilt or innocense.

said orders should be set aside, and the relief prayed for by plaintiffs be granted by this Court.

Respectfully submitted,
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DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF VIRGINIA.

CIVIL ACTION No. 285

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION, DEFENDANTS

REPLY BRIEF FOR THE UNITED STATES

It was admitted by counsel for Seaboard at the oral argument on June 1, 1944, in response to questions from the Court, that in a proceeding under Section 207 of the Interstate Commerce Act[1] the Interstate Commerce Commission should deny a certificate of public convenience and necessity if the facts indicated a violation of the antitrust laws. In the light of this admission that the Commission should consider the effect upon competitive conditions of

[1] 49 U. S. C. A. 307.

Seaboard's entry into the motor carrier field,[2] the questions remaining[3] for decision by the Court are whether or not the Commission did, in its action upon Seaboard's applications, comply with this admitted obligation.

It is submitted that examination of the Commission's reports discloses that the Commission did not discharge that duty. Arguments that the Commission did give due consideration to this important issue are manifestly without adequate foundation; for it is readily apparent that the Commission did not make the necessary findings essential to support such a contention, and did not have before it a record upon which it could have made such findings.

The Commission's brief does not question "the Commission's power in appropriate cases to treat multiple applications as being in substance a single application," but argues that under the doctrine of "administrative finality" this Court is not permitted to determine independently whether Seaboard's applications constitute a single application covering an integrated operation, "but must

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[2]The correctness of this view is clearly sustained by the authorities cited on p. 9 of the brief for the United States, particularly *Chesapeake and Ohio Railway Co.* v. *United States*, 283 U. S. 35 (1931). This conclusion is fortified by consideration of the provisions of Sections 5 (2)(b) and 202(c) of the Act. (49 U. S. C. A. 5(2)(b); 49 U. S. C. A. 302(c)). Moreover, as the Court pointed out during oral argument, the Commission in many cases has in fact considered the question of competition and monopoly. See, for example, *Virginia Stage Lines* v. *United States*, 48 F. Supp. 79, 81 (W. D. Va. 1942); *Sante Fe Trail Stages, Inc. Common Carrier Application*, 21 M. C. C. 725, 748.

[3]Regarding the question of alleged violations of tariff and accounting requirements, where no remedy may be had in the present proceeding, nothing need be said. Similarly no reply is necessary to Seaboard's argument regarding the position of the Department of Justice. Seaboard's brief, pp. 44-60. It is plain that by statutory requirment the United States is an indispensable party. 28 U. S. C. A. 46. It is likewise obvious, under elementary principles of pleading, as well as the specific provisions of Rule 8(b) of the Federal Rules of Civil Procedure, that a party has an option whether to "admit or deny the averments" of the complaint. Rule 11 requires a conscientious belief by the attorney signing the pleading that there is good ground to support it. Moreover, an attorney representing the United States is under a peculiar obligation to act with due regard to the rights of all parties concerned, and to acquiesce in just claims as readily as to resist unfounded ones. See *Viereck* v. *United States*, 318 U. S. 236, 248 (1943).

accept the Commission's determination on that score if there be substantial warrant in the record.'"[4]

The weakness of this argument is that, in fact, the Commission made no "determination on that score." No findings were made with respect to the propriety of Seaboard's failure to incorporate all the routes requested in a single application. The only language actually appearing in the Commission's report seems to substantiate plaintiffs' contention that an integrated plan was contemplated. It was there said:

> It is true, as protestants point out, that a possible result of granting the applications included in the title proceeding, and Sub. Numbers 1 to 8, which include routes between Richmond and Columbia, would be a unified service in three States, and that applicants may have intended such result when the several applications were filed.[5]

The Commission does go on to say that "we now have the entire situation presented by the several applications before us in all of its aspects, following full and complete hearings";[6] but the "full and complete hearings" of which the Commission there speaks are the very same hearings where the Joint Boards refused to receive evidence relating to service over routes other than the particular ones embraced in the applications before such Joint Boards.

As the Court indicated at the oral argument, judicial notice may be taken of the fact that nothing plus nothing plus nothing still equals nothing.

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[4]Commission brief, pp. 24-25. Similar contention is made in Seaboard's brief, pp. 21-22, 29, although it is admitted that no findings to that effect were "explicitly spelled out." The Commission's brief, p. 26, similarly bases its argument upon "the substance and effect" of the Commission's action, rather than upon any expressly formulated findings.

[5]Report of July 11, 1939. Ex. "L" to complaint, p. 60.

[6]Ex. "L" to complaint, p. 61.

It cannot be denied that, as the result of the procedure followed by the Commission in acting upon Seaboard's applications, there never was any opportuntiy for evidence to be presented regarding the issue of undue restraint of competition.[7]

Furthermore, it is submitted that such evidence would be obviously pertinent and essential even if it were true that the Commission had made findings to the effect that Seabaord intended each application to cover a separate and isolated operation. The aggregate effect of such separate operations, when substantially paralleling the entire extent of Seaboard's rail line, might well have the effect of restraining competition; just as the effect of a chain of grocery stores upon independent shopkeepers might be serious, although each of the chain stores individually might be no greater in size than the independent competitor located in its neighborhood. Consequently, even if the Commission had found that Seaboard was acting without any "fraud" with respect to the scope of

[7]The issue of undue restraint of competition was not involved in *Parker* v. *United States* (S. D. Indiana, Indianapolis Division, Civ. No. 781), a pending and undecided case to which reference was made by Commission counsel during oral argument. Nor was the question as to denial of a fair hearing involved. Nor did the Commission fail to make explicit findings. In that case there was a single application, and protestant motor carriers were fully heard. They insisted that an applicant under Section 207 must prove absolute "necessity" for the proposed service (cf. *Petersburg Etc. Ry. Co.* v. *Commonwealth*, 152 Va. 193, 203-206 (1929)), and asserted a more extensive privilege to be free from the competition of new operators than established carriers are entitled to claim under federal law. (Although in many jurisdictions, including Virginia, state regulatory statutes contain provisions of the sort which the protestants in the *Parker* case sought to read into the federal law. See the authorities cited in Brief for the United States, p. 9, footnote 16; and *Southside Transportation Co.* v. *Commonwealth*, 157 Va. 699, 704-705 (1932); Acts of Assembly, March 25, 1930, sec. 3, March 9, 1936, sec. 6(c); Michie's Code 1942, secs. 4097(o), 4097y(6)(c). See also *Central Ohio Transit Co.* v. *Public Utilities Comm.*, 115 Ohio St. 383, 391-3 (1926).) In the *Parker* case, the Government considered it important to controvert these contentions. Hence it stressed and amplified in its brief the discussion relating to the proper construction of Section 207 with regard to these points; but its position there with respect to the statutory standards prescribed by Section 207 was otherwise in all respects exactly the same as in the case at bar, and was expressed in language almost identical with that contained in its brief in the case at bar.

its several applications, it was undoubtedly the duty of the Commission to receive the evidence regarding the economic effect upon competitive conditions of Seaboard's entry into the motor carrier field. But no opportuntiy was ever given for such evidence to be heard.

Seaboard seeks support for its position in the Commission's findings with respect to restraint of competition contained in the report of July 6, 1942.[8] That report was made after the hearing held on November 12 and 13, 1941, which hearing was limited to the question of *modification of "key points."*[9] Consequently, that finding simply determined that *"the modifications requested"* as to "key points" would not result in undue restraint upon competitive conditions.

The Commission did not decide, nor did it have available a record upon which it could determine, whether the substitution of the "key-point" condition for the prior or subsequent rail-haul condition would result in consequences contrary to the antitrust laws, or whether such consequences should have precluded a finding of public convenience and necessity when the Commision passed upon Seaboard's applications in the first instance. This is expressly shown by the language used by the Commission:

> *The modifications requested* will in no way change the character of the service applicants are authorized to perform as a motor carrier; nor will they adversely affect the operations of existing motor carriers, nor restrain competition in the motor-carrier field.[10]

Obviously, if the Commission had made a broader finding, without the benefit of evidence on the subject, it

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[8]Ex. "S" to complaint, p. 123; Seaboard's brief, p. 69.

[9]See brief for the United States, p. 4.

[10]Ex. "S" to complaint, p. 123. [Italics supplied.]

would be the duty of this Court to set aside any order based upon such a finding.[11]

The argument that Seaboard's service by motor vehicle is not competitive with that of independent motor carriers, but is a peculiar type of special service having the characteristics neither of rail service alone nor of motor vehicle service alone,[12] is likewise not warranted by anything contained in the findings made by the full Commission. Such an argument might perhaps have been advanced with some justification if the findings made by Division 5[13] had been accepted by the full Commission. Combined rail-and-truck service might perhaps reasonably be regarded as a type of through service, not identical with the all-motor service performed by independent motor carriers generally. Division 5 regarded such combined rail-and-truck service as beneficial to the public, but stated that there was no need for any additional motor carrier service *simpliciter*. Division 5 expressly found that "the only need shown of record is for service which is strictly supplemental of, or auxiliary to, and coordinated with applicants' rail service."[14] Hence Condition 3 was imposed, requiring prior or subsequent rail haul.

The full Commission, however, without hearing any additional evidence, differed with Division 5.[15] It authorized "substituted" service, and not merely "auxiliary" or "supplemental" service coordinated with Seaboard's rail service.

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[11] *Chicago Junction* case, 264 U. S. 258, 265 (1924). As was said by Commissioner Eastman on the occasion of his last public appearance, on February 17, 1944:

"The courts were at one time much too prone to substitute their own judgment on the facts for the judgment of administrative tribunals. They are now in danger of going too far in the other direction. The principle that it is an error of law to render a decision not supported by substantial evidence is a salutary principle. The courts should enforce it."

[12] Commission brief, pp. 30-32; Seaboard's brief, p. 35.

[13] Report of July 11, 1939. Ex. "L" to complaint, pp. 77-79.

[14] Ex. "L" to complaint, p. 79.

[15] Report of January 24, 1941. Ex. "M," pp. 87-88. Quoted in brief for the United States, pp. 12-13.

In departing from the reasoning of Division 5, and in abandoning the prior or subsequent rail-haul condition, the full Commission plainly fell into error of law, and for the statutory standard of "public convenience and necessity" substituted the test of railroad convenience and operating economy.

Division 5 found that there was adequate independent motor-carrier service between all stations, so that public convenience and necessity did not require institution of new motor-carrier service, under railroad control, which is not coordinated with prior or subsequent rail service. The full Commission held, however, that the reason for coordinating truck service with rail service was not in order to make available to the public a new type of service, but that the reason for such coordination was to be found in the fact that rail service was uneconomical and inefficient. The full Commission then concluded that this same reason was applicable to service between stations, regardless of whether there is a prior or subsequent movement by rail.

As authority for its holding that reduction in the cost of rail service constitutes sufficient proof of "public convenience and necessity," the full Commission cited *Texas* v. *United States,* 292 U. S. 522 (1934), and *New York Central Securities Corp.* v. *United States,* 287 U. S. 12 (1932). These are, likewise, the only cases cited in the Commission's brief (p. 32) in support of the proposition that reduction in cost justified substitution of trucks for train service.

It is submitted that these decisions are not pertinent, and do not warrant the action taken by the full Commission in disregard of the findings made by Division 5.

Both of those cases were decided *prior to the enactment of federal regulation of motor carriers* in 1935. Both of them dealt with merger *proceedings under Section 5* of the Interstate Commerce Act, as amended by the Trans-

portation Act of 1920. Both of them related to *rail* mergers, and did not deal in any respect with transportation by motor vehicle. Neither of these cases involved determination of "public convenience and necessity"; the standard applicable under Section 5 being whether the transactions proposed were consistent with the "public interest."[16]

In the *Texas* case the Commission approved the acquisition of control of one railroad by another under a lease permitting the lessee to abandon certain general offices and shops of the lessor, which under Texas law were required to be maintained within the state of Texas. The Court held that under the Transportation Act of 1920, the avoidance of waste was a direct concern of the public, and that the Commission was empowered to relieve interstate carriers from burdensome outlays, even though such burdensome expenditures were required under the terms of state statute.[17]

It seems plain that considerations of economy might well warrant a finding that a railroad merger is consistent with the public interest. Such an improvement in the financial position of a carrier furnishing rail service might well be regarded as beneficial to the public served by such carrier. Improvement in rail service by adoption of electrification or use of Diesel power might also reasonably by deemed beneficial to the public using such service. Indeed, the improvement of rail service by the use of any unregulated instrumentality (such as trucks were prior to 1935) might be similarly viewed.

But when the use of trucks became subject to regulation in 1935, it was no longer permissible for a rail carrier, any

[16]The difference between a Section 5 proceeding and a Section 207 proceeding is recognized in the Commission's brief, pp. 37-40; yet the Commission is unable to cite any authority other than these two rail merger cases under Section 5, which arose prior to 1935, in support of the proposition that economy of operation is to be regarded as proof of public convenience and necessity. See also plaintiffs' brief, pp. 80-81.

[17]292 U. S. at 530-531.

more than any other person, to make use of motor vehicle service without complying with the provisions prescribed by statute regarding such motor operations on the highway. Those statutory requirements included the test of "public convenience and necessity." This test plainly related to the transportation requirements of those members of the public who utilized motor service, rather than the requirements of those members of the public who utilized rail service. No longer was it possible to justify, on the ground that it benefited the patrons of railroads by reducing the operating expenses of rail carriers, a motor vehicle operation which did not fully comply in all respects with the requirements established by law for the regulation of transportation by motor vehicles.

It is submitted that the two cases relied on by the Commission do not warrant the conclusion that truck service may be authorized merely because rail service is uneconomical and expensive.

It is submitted that the Commission's order should be set aside for mistake of law and failure to apply the appropriate statutory standards, as well as for abuse of discretion and failure to afford a full and fair hearing where evidence could be offered with respect to the essential issue of the economic effect upon competitive conditions of Seaboard's entry into the motor-carrier field.

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